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IN THE

Supreme Court of the United States

October Term, 1939.

No. 476

UNITED STATES OF AMERICA,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellees.

APPEAL FROM DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR APPELLEES.

GENERAL STATEMENT.

By the Act of July 2, 1864 (13 Stat. 365) Richard D. Rice and others were created a body corporate, by name Northern Pacific Railroad Company, empowered to construct a continuous railroad and telegraph line from a

point on Lake Superior in Minnesota or Wisconsin, westerly by the most eligible railroad route, as determined by said company to Puget Sound, with a branch via the valley of the Columbia River, to a point at or near Portland, Oregon, leaving the main line at a point not more than 300 miles from its western terminus. The capital stock to be 1,000,000 shares of $100 each. When 20,000 shares have been subscribed and $10.00 per share paid in, a meeting of subscribers shall be called and directors elected. Section 1.

A right of way 400 feet in width through the public lands is granted, together with additional lands for station buildings, work shops, switch tracks, etc. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, the Indian title to all lands falling under the operation of the act and "acquired in the donation to the road." Section 2.

To aid construction of the railroad and telegraph line and secure transportation of the mails, troops, munitions of war and public stores, every alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty sections per mile on each side of the line through the Territories, and ten sections per mile through the states is granted, with indemnity in case any of said sections shall have been granted, sold, occupied by homestead settlers or otherwise disposed of at the time of the definite location of the railroad opposite said sections, to be selected by the company under the direction of the Secretary of the Interior, in alternate odd sections, not more than ten miles beyond the granted or place limits; provided, that if the route shall be found upon the line of any other railroad route to aid in the construction of which lands had been theretofore granted by the United States,

so far as the routes are upon the same general line, the amount of lands so granted shall be deducted. Mineral lands are expressly excluded from the grant, and in lieu thereof a like quantity of agricultural lands, nearest the line of road and within fifty miles thereof, may be selected by the company. Section 3.

Whenever 25 consecutive miles of any portion of the railroad and telegraph are ready for service, the President of the United States shall appoint three commissioners to examine and, upon favorable report, patents shall be issued to the company for the lands opposite sections of completed road; and from time to time, as additional 25 consecutive miles have been completed and accepted by the President, patents shall be issued, and so on as each 25 mile section of road is completed, and accepted. Section 4.

The grant is subject to the express conditions subsequent that the company shall commence work on the road within two years from the approval of the Act by the President, complete not less than fifty miles per year after the second year, and complete and equip the whole road by July 4, 1876. Section 8.

If the company make any breach of conditions of the grant and allows the same to continue for one year, the United States "may do any and all acts and things which may be needful and necessary to insure speedy completion of the said road." Section 9.

All the people of the United States shall have the right to subscribe for the stock until the whole thereof shall be taken up, and no mortgage or construction bonds shall be issued by the company on the road, or mortgage or lien made in any way, except by consent of Congress of the United States. Section 10.

The railroad shall be a post route and military road, subject to the use of the United States for postal, military and all other Government services, and subject to such regulations as Congress may impose restricting the charges for such Government transportation. Section 11.

The acceptance of the terms and conditions of the act by the company shall be signified in writing by the board of directors within two years after passage of the Act Section 12.

Claiming to have duly organized, the incorporators filed the company's acceptance of the act within the two years provided by Section 12. Difficulties were encountered, however, in complying with other conditions, and from time to time they were modified.

It was evidently the belief of the promoters that the road could be financed by popular stock subscriptions, and so Section 10 prohibits a mortgage on the road and issuance of bonds. This expectation was disappointed. The time for commencing and completing the railroad was twice extended (14 Stat. 355), (15 Stat. 255). On June 11, 1879 the Secretary of the Interior ruled that the final date of completion was July 4, 1879. Both parties are agreed on this date, and it was accepted by the Court below. Master's first report (R. 264).

In May, 1866, Edwin F. Johnson was appointed Chief Engineer and directed to make a preliminary survey. He did so and presented his first report in November, 1867, together with a map designating the tentative route. This map showed the line to Puget Sound via the valley of the Yakima River in Washington Territory, and it was afterwards so definitely located and constructed. First report (R. 264).

By this time it was certain that the necessary money, estimated at $100,000,000, could not be raised by sale of stock. The Joint Resolution of March 1, 1869, gave consent of Congress to issue bonds secured by mortgage of the railroad and telegraph line (15 Stat. 346). Jay Cooke & Co. undertook to market the bonds.

By Joint Resolution approved April 10, 1869 (16 Stat. 57), the company was authorized to extend its branch line from a point at or near Portland to a suitable point on Puget Sound, and to connect the same with its main line west of the Cascade mountains in Washington Territory, the extension being made subject to all of the conditions and the company being entitled to all the rights and privileges conferred by the Act of July 2, 1864 and acts amendatory thereof; but with a proviso that the company should not be entitled to any subsidy in money, bonds or additional lands from the United States in respect to said extension, excepting lands for the right of way; and providing that at least 25 miles of the extension from Portland to Puget Sound should be constructed before July 2, 1871, and 40 miles per year thereafter until the whole of the extension should be completed.

The Joint Resolution of March 1, 1869 was not acted upon. Nor was the Joint Resolution of April 10, 1869, obviously for the reason that the extension from Portland to Puget Sound could not be built without the aid of a subsidy of money or lands. Accordingly the Joint Resolution of May 31, 1870 (16 Stat. 378) authorized the company to issue bonds to aid in construction and equipment of its road secured by mortgage on all of its property, its railroad, land grant, and franchise to be a corporation. To aid the new line a grant of land is made identical in

terms with the original grant, and a second indemnity belt for both grants is provided.

Under this legislation the company, aided by Jay Cooke, placed a bond issue of approximately $30,000,000, secured by mortgage of the railroad and land grant. Work was begun on February 15, 1870, at Thompson Junction, now Carlton, Minnesota, and completed to the Red River of the North at Moorhead, December 30, 1871. Between 1871 and the spring of 1873 the road was completed to the Missouri River at Bismarck, N. D. The total distance of the completed line was 424.4 miles. During the same period the road from Portland to Puget Sound was constructed from Kalama, Washington on the Columbia River, to Tacoma, a distance of 106.1 miles. Master's first report (R. 267). By this construction the company earned approximately 10,000,000 acres (Report, R. 268).

Just as the enterprise appeared certain of accomplishment within the required time the panic of 1873 occurred. The failure of Jay Cooke September 18, 1873 brought construction to an end. Master's first report (R. 267). Sale of bonds ceased. Money could be obtained only on ruinous terms. Accruing interest on outstanding bonds could not be paid. A fresh start was necessary. Accordingly the reorganization of 1875 was resorted to under court order. The stock was divided into $51,000,000 of preferred and $49,000,000 of common. The bondholders received $30,000,000 of preferred stock for their $30,000,000 of bonds plus accrued interest so that each bondholder received $1,400 of preferred stock for each $1,000 of bonds. The balance of $9,000,000 of bonds remained in the treasury. The common stockholders exchanged their stock share for

share for new stock. The bondholders committee, which became the purchaser at the foreclosure sale, and the receiver, reconveyed the property to the Northern Pacific Railroad Company, the federal corporation created by the Act of July 2, 1864. See Master's discussion of the reorganization and its legal effect. First Report (R. 299-314).

The reorganized company was thus freed of debt, with about 530 miles of constructed line and approximately 10,000,000 acres of earned land, and the right to earn approximately 30,000,000 additional acres by completion of the road. The company resumed construction in the spring of 1879. By June, 1880 the road had reached a point 100 miles west of Bismarck; by July, the Yellowstone River in Montana. In October, 1879 construction began at Wallula in Washington Territory and was carried eastward from that point. Construction from Thompson Junction in Minnesota to the eastern terminus at Ashland, Wisconsin, on Lake Superior, was completed in 1883. Track laying east and west met in Montana on August 22, 1883, and the golden spike was driven September 8 of that year. At Kalama, in Washington Territory, the line crossed the Columbia River by ferry to Goble, Oregon, where it connected with the remaining portion of the line from Portland. By contract made with the Oregon Railroad and Navigation Company the Northern Pacific obtained the right to use the line of that company from Wallula to Portland where it connected with the line to Puget Sound. Though the company reserved by the contract the right to build its own line from Wallula to Portland, it has never done so (N. P. Ex. 71, R. 722). The grant in aid thereof was forfeited by the General Forfeiture Act of

September 29, 1890 (26 Stat. 496). The Cascade Branch from Pasco to Tacoma was completed in 1887. The length of the road from Ashland to Tacoma and Portland is more than 2,000 miles.

As twenty-five mile sections were completed commissioners were appointed, examined the road, reported favorably, and it was accepted by the President. U. S. vs. Northern Pacific R. R., 256 U. S. 51, 60. The land grant earned by construction was certified, and, as surveyed, patents were duly issued. Trains have been operated with regularity, and mail, troops and supplies have been carried at the rates fixed by Congress. Settlers came into the territories of Montana, Idaho and Washington. They were admitted as States in 1889. By that time the stated purposes of Congress in chartering the railroad and making a grant of lands in aid thereof had been completely fulfilled. *The company had earned and was entitled to receive every acre of its grant.* Its right was never afterwards questioned until this suit was filed. As this court said in 1921:

> "A third of a century already has elapsed since the company earned the right to receive what was intended by the grant." 256 U. S. 51, 67.

The federal corporation operated the road until receivers were appointed in the panic of 1893. Foreclosure and sale occurred in 1896 by which, and by various deeds, the Northern Pacific Railway Company came into possession of the railroad, land grant, and all other property of the federal corporation. Finding I, Conclusion (b) (R. 605). It has operated the road ever since. Patents for millions of acres have been issued to it. It has been recognized by every branch of the Government as the successor in interest

of the federal corporation. It is so recognized by the Act of June 25, 1929 under which the present suit was brought. It has faithfully discharged every obligation imposed by the Act of July 2, 1864.

Deficiency in the Grants.

By 1895 it was known that there was a large undetermined deficiency in both grants which the railroad could not satisfy from lands in the indemnity belts. The 1870 grant was known to be largely deficient from its date. By the Act of February 26, 1895 (28 Stat. 683) Congress provided for a mineral classification of lands in Montana and Idaho. Under this act there were classified as mineral approximately 3,782,377.90 acres of place lands (Complaint, Subd. XXVIII) and 1,187,840.27 acres of indemnity lands. These additional losses made certain a deficiency of several million acres. Yet in face of this known deficiency, by various proclamations of the President and executive orders, between March 1, 1898 and May 15, 1924, there were withdrawn from the *first indemnity* belt of the 1864 grant, and placed in national forests and other Government reservations, 1,103,42[illegible]9 acres. These lands, when surveyed, examined and found to be non-mineral, would have been available for indemnity. See Finding II (f) (R. 607). During the same period there were similarly withdrawn from second indemnity limits of the 1864 grant, 961,992.84 acres. Finding II (j) (R. 610). Total withdrawals from the grant of 1864 were 2,065,597.28 acres.

During the same period there were withdrawn from first indemnity limits of the grant of 1870, 155,727.84 acres

(Finding II (f), Grant of 1870, R. 614). Withdrawals from second indemnity limits of the 1870 grant were 213,001.66 acres (Finding III (j), R. 617).

The company was helpless to protect its rights against the withdrawals. The title to the land was in the United States. The United States could not be sued. *Louisiana v. Garfield,* 211 U. S. 70; *New Mexico v. Lane,* 243 U. S. 52, and like cases. The company did bring a suit in the Supreme Court of the District of Columbia, *sub nom. Northern Pacific Railway v. Lane,* on appeal, 46 Appeal Cases, Dist. Col. 434, to restrain the Secretary of the Interior from cancelling a selection list of unsurveyed indemnity lands withdrawn for Priest River Forest Reserve. The Court of Appeals held that there was no right of selection before survey; and further,

> "The title to the lands in question being in the United States at the date of the executive order withdrawing them for forestry purposes, it follows that plaintiff's action must fail, not only on the merits of the case, but because the suit is one against the United States, *Louisiana v. Garfield,* 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31; *New Mexico v. Lane,* 243 U. S. 52, 61 L. ed. 588, 37 Sup. Ct. Rep. 348."

The company took an appeal to this court but dismissed it October 6, 1920, the day before the *Forest Reserve Case,* 256 U. S. 51, was argued.

Forest Reserve Case.

The Act of March 3, 1891 (29 Stat. 1103, carried into U. S. C. A. as Title 16, Sec. 471), authorizes the establishment of national forests, as follows;

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof."

As stated above the withdrawals from the indemnity limits were made. The validity of these withdrawals is the important question in the case because there are left only about 700 acres available for indemnity in the grant of 1864 and about 2,000 acres in the grant of 1870 outside of forest reserves (Master's second report, R. 430).

The withdrawn lands were except as to small areas, unsurveyed at dates of withdrawal. As the Land Office would not accept indemnity selections prior to survey they could not be selected before withdrawal. Subsequently to 1898, as the withdrawn lands were surveyed, the company made repeated efforts to file selection lists. The Secretary of the Interior would not accept them. He always recognized depletions by the Government as valid. Second report (R. 430); Finding II (e-2), (R. 607), 256 U. S. 51, 61.

In 1905 the company filed a list of 5,681.76 acres in first indemnity limits of Montana, withdrawn and placed in the Gallatin National Forest. The local land office approved the list. By mistake, as afterwards claimed, the Secretary

of the Interior issued patent. Later, on discovery of the supposed mistake, the United States brought suit for cancellation of the patent. The case came to this court *sub nom. United States* v. *Northern Pacific Railway Company*, 256 U. S. 51. It was held:

1. That the Act of July 2, 1864 and Joint Resolution of May 31, 1870 embodied an offer that if the company would construct and operate the railroad it should receive the granted lands.

2. Acceptance and performance by the company, converted the offer into a contract, binding upon the government.

3. The promise of indemnity land was an integral term of the contract; and, upon performance by the company, was a vested right protected by the due process clause of the Constitution.

4. The right of the company to select and receive the indemnity lands, when surveyed, is complete *as against the United States* even though the lands, until surveyed and selected by the company, were open to acquisition by settlers.

5. Withdrawals for governmental purposes of any indemnity lands are invalid unless there remained sufficient surveyed, non-mineral lands available for selection to satisfy all losses.

6. "The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections, or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was made . . . . . There would be no right to indemnity as re-

spects the moiety not included, nor as respects the lands required to be deducted." (p. 68)

7. Whether the grant was deficient at the time of the withdrawals is a question for determination, in the first instance, by the Secretary of the Interior.

Because the evidence did not establish these two deductions necessary to determine the exact measure of the grant, the case was remanded.

The Act of June 25, 1929.

The Land Department, with the co-operation and assistance of representatives of the Railway Company, undertook an adjustment of the grant pursuant to this decision. A so-called tentative adjustment was prepared by the Land Office and transmitted by letter of December 19, 1923 to the United States Forester, to the Department of Justice, and to the Railway Company, for comment. The Forester raised many objections. That matter was then called to the attention of President Coolidge and the Public Lands Committee of both House and Senate, with the suggestion that Congress create a joint committee to examine and report upon the whole subject of the adjustment of the grant. The result was the Joint Resolution of June 5, 1924 (43 Stat. 461), directing that no further patents be issued until the investigation had been completed by a joint committee of Congress. The committee began hearings March 18, 1925. It took a vast amount of testimony and made a report which, with some changes, became the Act of June 25, 1929 (46 Stat. 41) under which this suit was brought.

The Pending Suit.

The complaint was filed July 31, 1930. On motion of defendants the case was referred to a special master to report on special demurrers and pleas under Equity Rule 29 (R. 254). The Master made and filed his first report May 31, 1933 (R. 262). His recommendation was that the demurrers and pleas be sustained with the exception of demurrer to division XXII of the complaint (R. 41); answer (R. 205); Master's first report, p. 88 (R. 314), relating to the conflict between the grant of July 2, 1864 and the prior grant to the Portage, Winnebago & Superior Railroad Company. The District Court overruled all exceptions and confirmed the Master's report by order dated October 3, 1935 (R. 411).

Thereafter, by order dated April 21, 1936, the case was again referred to the Master to report on the adjustment of the grant. The Master made his second report on July 26, 1937 (R. 421). The District Court overruled some and sustained some exceptions of the Government and overruled all exceptions of defendants (R. 577). The result of these rulings was findings and decree (Par. VII, R. 643), that defendants are entitled to just compensation for 1,453,061 acres of withdrawn lands and patents to 412,106.58 acres of surveyed and 16,880.10 acres of unsurveyed lands outside the reserves (Par. VI, R. 643).

The amount of compensation to be paid was left for further determination; but the case is here on the intermediate decree under the special act of May 22, 1936, c. 444, 49 Stat. 1369.

ARGUMENT.

This appeal brings the case before the court in two aspects: first, questions arising out of the rulings below on the demurrers and pleas, covered by the Master's first report; and second, questions arising out of the adjustment of the grant, covered by the Master's second report. Questions arising on the Master's first report, dealt with in Part I, are the following:

1. Non-subscription to capital stock, p. 16.
2. Forfeiture for non-completion of the road, or completion out of time, p. 24.
3. Mineral classification, p. 59.
4. Circuitous route through Washington, p. 87.
5. Indian treaties, p. 93.
6. Pre-emption proviso of the Joint Resolution of May 31, 1870, p. 121.

Questions arising out of the Master's second report, dealt with in Part II, are the following:

1. Measure of the grants, p. 133.
2. Invalidity of Withdrawals, p. 139.
   (Idaho restorations, p. 154.)
3. Homestead entries after withdrawals, p. 157.
4. Northern Cheyenne Indian Reservation withdrawal, p. 158.
5. Agricultural lands, p. 160.

PART I.

1. Stock Subscriptions.

(Government Point 2, Brief 59)

We will discuss this subject under the following points:

(a) As the Government did not except to the Master's report sustaining the demurrer to subdivision VI of the complaint, and has assigned no error to the order of the District Court confirming the report, the objection is not open in this Court, p. 17.

(b) The irregularity, if any, in the corporate organization has been waived by recognition by the Government of the corporate existence of the railroad company and dealing with the company for many years, p. 17.

(c) That the Northern Pacific Railroad Company was duly organized, constructed the railroad and became entitled to the lands has been *res adjudicata* for many years, p. 19.

Subdivision VI of the complaint (R. 18) alleges failure to comply with Section 19 of the Act of July 2, 1864, providing that,

> "unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void."

The Government argues that the Northern Pacific ceased to exist on July 2, 1866, two years after passage of the act. But the bill of complaint, subdivision II, (R. 2), alleges that

the Northern Pacific Railroad Company *is in existence* and has an office in the city of New York. Subdivision V alleges that, by acceptance of the act, a contract was entered into between the Northern Pacific Railroad Company and the United States. The Government claims relief against that company; it answered and took part in the trial. How, then, is it possible to say the Act of July 2, 1864 became void? There is no prayer for relief appropriate to irregularity in organization. If the irregularity be now open to question, the company never came into being; no lands ever passed or could pass; no railroad was or could have been constructed by the company; no government property has been or could be carried by the company at rates fixed by Congress. The Government explains at several places in its brief that the suit was brought under the direction of Congress and the matters alleged are at the direction of Congress. Perhaps this feature was injected because Congress so directed, rather than for any merit it is supposed to have.

(a) A demurrer was sustained to subdivision VI. It would be sufficient here to say that the Government took no exception to the Master's ruling on the demurrer and has assigned no error thereto. It follows that the ruling on the demurrer is not open to review in this court.

(b) The Master considers the point in his first report, (R. 289). He shows that Congress took no notice of the alleged irregularity, if such there be. It overtaxes credulity to believe that Congress did not know that the Northern Pacific Railroad Company had ceased to exist, if that be a fact. The debates, to which appellant refers, abundantly prove that Congress knew, as early as 1866, that the company could not market its stock. Accordingly, by Sec-

tion 2, the Joint Resolution of May 7, 1866 extended the time for completing the railroad two years; by Joint Resolution of July 1, 1868 time of completion was further extended; by Joint Resolution approved March 1, 1869 a mortgage was authorized; by Joint Resolution of May 31, 1870 authority was given to construct an additional line, and a mortgage again authorized. Each of these acts is inconsistent with the claim that the Act of July 2, 1864 had died and that Northern Pacific Railroad Company never came into existence. Congress has passed 34 separate acts, ending with the Act of March 5, 1931, in each of which it deals with and recognizes the Northern Pacific Railroad Company, and its successor, Northern Pacific Railway Company. Those acts are listed in the answer (R. 156-163).

From completion of the road in 1883 Government property and personnel has been carried at rates fixed by Congress; patents have been issued for millions of acres as each 25 mile section was completed, examined and accepted. Maps of general route and definite location filed in the office of the Secretary of the Interior have been approved. By Section 4 of the very act under which this suit was brought it is declared that the title of the Railroad Company and its successor to the right of way and lands used in the operation of the road shall not be affected. As the Master said:

> "How it is possible in a suit brought under this Act to seek an adjudication that the road was never incorporated, that no grant either of land or right of way was ever made to it I will not now stop to inquire." (R. 291).

The Master held that the doctrine of legislative recognition of corporate existence controls and cures irregularities, if any, in the original organization. The Master cites and quotes from the authorities. It would be mere repetition to do more than refer to his report (R. 291).

There is another principle, not discussed by the Master, no less conclusive, namely, that "one who contracts with an acting corporation cannot defend himself against a claim on such a contract, in a suit by the corporation, by alleging irregularity of its organization." In *Chubb v. Upton,* 95 U. S. 665, 667, this court said: "This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court." See *Smith v. Sheeley,* 12 Wall 358, 361, 362. Acceptance of the provisions of the Act of 1864 and completion of the railroad constitute a contract between the United States and the company. *Forest Reserve Case,* 256 U. S. 51. This contract the company has performed, and this court said in the case cited:

> "A third of a century already has elapsed since the company earned the right to receive what was intended by the grant." (p. 67)

(c) That the Northern Pacific Railroad Company was duly organized, constructed the railroad, and earned the grant, is *res adjudicata* by repeated decisions of this court. The cases are listed in paragraph II B of the answer (R. 166). The record in those cases was offered in evidence. (R. 666-668). In *United States v. Northern Pacific Railroad Company,* 177 U. S. 435 (*Eastern Terminus Case*), the Government alleged:

> "That the defendant the Northern Pacific Railroad Company is and was at all the times hereinafter stated a railroad corporation duly created, organized, and existing under a certain act of Congress entitled 'An Act Granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route' approved July 2nd, 1864, and the Acts amendatory thereof and supplemental thereto, and having its principal place of business in the city of Saint Paul, County of Ramsey, and State of Minnesota."

Other cases in which the Northern Pacific Railroad Company and Northern Pacific Railway Company were defendants and similar allegations were made, are:

United States v. Northern Pacific Railroad Company, 193 U. S. 1 (*Portland Overlap Case*); *United States v. Northern Pacific Railway et al.,* 227 U. S. 355 (*Yakima Indian Reservation Case*); *United States v. Northern Pacific Railway Company,* 256 U. S. 51 (*Forest Reserve Case*). In the case last cited the court said:

> "The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. *The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.*" (p. 58) (Italics supplied)

The court further said in that case that the company had duly accepted the terms of the grant, filed maps of general

route, definitely located the line in the mode prescribed, and constructed and completed the road from Ashland to Tacoma. The road was examined, favorably reported by the commissioners and accepted by the President. Citing Reports of Commissioner of Railroads, for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; *Doherty v. Northern Pacific Ry. Co.,* 177 U. S. 421; *United States v. Northern Pacific R. R. Co.,* 95 Fed. Rep. 864; s. c. 177 U. S. 435; *United States v. Northern Pacific R. R. Co.,* 193 U. S. 1.

The judgments in those cases, and others that could be cited, are conclusive that the Northern Pacific Railroad Company was duly organized under the Act of July 2, 1864; that it duly accepted the act; that thereby a contract resulted; that the company has fully performed its contract; that the railroad has been examined and approved by the commissioners and accepted by the President; that the company is entitled to the lands promised by Congress. These cases are *res adjudicata* whether this suit be upon the same or a different cause of action. If, as the Master thought, the point could not be taken by demurrer, it is good under the pleas for the judgment records were offered in evidence. See the Master's discussion of *res adjudicata,* p. 37 (R. 284).

Finding I—"General Findings and Conclusions" (R. 603), to which no error has been assigned, is that the "Northern Pacific Railroad Company was created by the Act of Congress of July 2, 1864, with authority to construct a railroad and telegraph line from Lake Superior to Puget Sound, and by the Joint Resolution of May 31, 1870, to construct a railroad from a point at or near Portland to Puget Sound; that the last definite location of the railroad from Lake Superior to Puget Sound was December 8, 1884 and for the road from Portland to Puget Sound, was Septem-

ber 22, 1882; that the railroads were constructed, examined by the commissioners, favorably reported, and accepted by the President as in all respects in compliance with said Act and Joint Resolution." The court found that the Railway Company is the successor in interest of the Railroad Company and clothed with all of its rights and charged with all of its obligations. Paragraph II of the decree (R. 640) is to the same effect.

The Government states (Brief, p. 191) that if the company gets nothing more, it has fared richly at the hands of a generous government in that the cost of the railroad was "approximately $68,000,000" whereas before June 5, 1924, 39,000,000 acres of land had been conveyed (Brief, p. 66) for which, on p. 191, it is said the company has obtained values in excess of $200,000,000.00. Even if such benefits were received by the Company it would be immaterial to this litigation. As stated by the Court in *United States v. Union Pacific R. R. Co.* (98 U. S. 569, 620):

> "A court of justice is called on to inquire not into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the settled principles of equity, and to decide accordingly."

For the record, however, we enter an emphatic denial of the correctness of the statements of the Government above set forth. The facts are stated in the Company's answer, subdivision XIX, (R. 200), namely, that more than $300,000,000 has been spent in construction and equipment of the charter line, whereas net proceeds of the land grant to December 31, 1929 were approximately $90,000,000.

Disclaiming the thought of matching benefits with the Government, we ought to say that at the time the charter was under discussion Congress did not say or believe that all the advantages inured to the company. The Government in its brief says:

> "The first to succeed (Pacific Railroad bill) was the Union Pacific-Central Pacific of July 1, 1862, with a subsidy of over $100,000,000. With no more money forthcoming for another Pacific railroad, champions of the northern route proposed a grant of land so large that money would not be necessary." (p. 75).

The grant to the Northern Pacific was niggardly compared with the grant to the Union Pacific-Central Pacific. Those companies received $55,000,000 in bonds and half as much land per mile, and subsequently the right to make a mortgage to which the Government's existing prior mortgage was subordinated. The aid given to the Union Pacific-Central Pacific was not only sufficient to build the road, but, so it is said, enough to enrich some of the promoters. See *United States v. Union Pacific,* 98 U. S. 569.

The Government never has claimed any relief because of the matters stated in subdivision VI. That it sustained no injury is certain. If any injury resulted, it was to the company, not to the Government. For that injury the United States has no ground for complaint. *United States v. Union Pacific,* 98 U. S. 569. This claim is but another pretext for not complying with the decision of this court in the *Forest Reserve Case* in an effort to "save the (company's) lands for the United States", as suggested by the Acting Forester.

2. FORFEITURE.

(Government Point 4, Brief, 96)

Appellant argues that the company was not entitled to compensation for appropriation of indemnity selection rights because it did not construct that portion of the line from Wallula to Portland.

Whether this position is based upon the Act of 1929 or upon general principles of the law of grants is not clear. The government has shifted its position from time to time on this question but we will discuss the subject in all of its phases under the following points:

(a) There is such repugnancy between Sections 1 and 2 of the Act of June 25, 1929 that it is ineffectual to declare a forfeiture, p. 25.

(b) The Act is effectual only as an exercise of eminent domain power to retain the indemnity lands and make compensation therefor to the railway company, p. 27.

(c) If the Government ever had the right to forfeit, it could only be because of breach of conditions subsequent contained in Sections 8 and 9 of the grant.

(d) There can be no forfeiture of lands pertaining to and earned by constructed line. See p. 32. The rule is the same as to granted lands and indemnity rights, p. 35.

(e) Omission to build the line from Wallula to Portland and the forfeiture of the land grant pertaining thereto by the Act of September 29, 1890 does not relieve the United States from the obligation to perform its contract as to constructed lines: nor

can such omission validate the withdrawals or affect the obligation to compensate the railway company for the indemnity lands, p. 42.

(f) Breach of condition subsequent to build the road within the time limited does not, of itself, work a forfeiture. The right to declare a forfeiture has been waived, and the United States is now estopped, p. 51.

(a) Section 1, Act of June 25, 1929:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are, situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants; *Provided,* That for any or all of the aforesaid in-

demnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States."

Section 2:

"That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company, or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States."*

*Paragraph VI of the decree (R. 643), is that the United States forthwith execute and deliver to defendant Northern Pacific Railway Company patents for 412,106.58 acres of surveyed lands described in Schedule A attached to the decree. These lands were not included in any withdrawal. They are, for the most part, place lands listed, and in part indemnity lands selected prior to the Joint Resolution of June 5, 1924. The Government has not assigned error and in its brief consents that these lands be patented to the Railway Company. The so-called forfeiture, therefore, has no application to these lands.)

Section 1 expropriates the withdrawn lands which were available to satisfy the company's indemnity selection rights and provides for compensation. It is an exercise of eminent domain power. Master's second report, (R. 503). The decree, accordingly, quiets the Government's title and

provides for compensation. Section 2 provides that these same indemnity selection rights are "hereby declared forfeited to the United States." We cannot reconcile Sections 1 and 2.

(b) The Act of 1929 does not, in reality, declare a forfeiture. Forfeiture and rescission put an end to the contract. A party cannot continue to claim and receive benefits after rescinding in whole or in part. The Government does not propose to surrender any advantage it received, especially the very valuable right of transportation at land grant rates. The general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract. *United States v. Detroit Lumber Co.*, 200 U. S. 321, 339; *United States v. Stinson*, 197 U. S. 200; *State of Iowa v. Carr*, 195 Fed. 257, 266; *Mason v. United States*, 260 U. S. 545. The act is not, as entitled, "An act to declare forfeited to the United States". It is really an act to declare a breach of contract by the United States. The Government has not so far defended the so-called forfeiture under Section 20 of the Act of July 2, 1864, which reserves the right to "add to, alter, amend or repeal". In *Sinking Fund Cases*, 99 U. S. 700, the court said:

> "They (the United States) cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad". (p. 719)

Defendants insist, therefore, (a) that the repugnancy between Section 1 and 2 is such that the Act of 1929 is not effectual to declare a forfeiture; and, (b) that the act

is effectual only as an exercise of eminent domain power.

In the District Court the Government relied to sustain the so-called forfeiture on failure to complete portions of the *constructed* road before July 4, 1879. That is the only point considered and decided by the Master and District Court. Master's first report (R. 383). The only reference made to the Columbia River line is in subdivision XXVII of the complaint (R. 225), alleging that the constructed line is entitled to only half of the lands in the conflict with the unconstructed Columbia River line. This is known as the "Wallula Overlap point". It was abandoned by the Government, Master's first report, (R. 328). In this this court the Government forsakes its position below, shifts its ground, and mends its hold. It is fundamental that an appellate court sits to correct errors, not to decide questions as a court of first instance. 2 R. C. L. Sec. 52, p. 69; Sec. 59, p. 79; Sec. 156, p. 183; *Illinois Central v. Eagan* (CCA 8), 203 F. 937; *M. & St. L. R. R. v. Winter,* 242 U. S. 353; *Virginian Railway v. Mullins,* 271 U. S. 220; *Rees v. Lombard,* 21 F. (2d) 276; *Ehman v. City of Gotehnburg* (CCA 8), 200 F. 564; *Lauf v. Shinner & Co.,* 303 U. S. 330, 331. We insist that a contention made for the first time in this court is not available.

(c) If the Government ever had the right to forfeit it could only be because of breach of conditions subsequent contained in Sections 8 and 9 of the grant:

> "Sec. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely, that the said company shall com-

mence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

"Sec. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof and allow the same to continue for upward of one year, then in such case at any time hereafter the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

The parties are agreed that the extended date for completion of the road was July 4, 1879. The line from Thompson Junction, now Carlton, Minnesota, to the Missouri River, 424.4 miles, was completed by 1873. The line from Kalama to Tacoma, Washington, 106.1 miles, was completed by 1874. The panic of 1873-1879 stopped construction. In 1879, after the reorganization of 1875, construction was resumed. The line from the eastern terminus at Ashland to Wallula in Washington Territory, and the line from Portland to Kalama, were completed in 1883. By contract with the O. R. & N. the link between Wallula and Portland was closed. (N. P. Ex. 71, R. 722). The historic date of completion of the line is September 8, 1883, when the golden spike was driven in Montana in the presence of President Grant and a distinguished company of native and foreign guests. (Master's First Report, R. 269). The Cascade Branch from Pasco to Tacoma was completed in

1887. The line from Wallula to Portland has never been constructed, nor even located.

Section 2 of the Act of June 25, 1929, states no grounds for the so-called forfeiture. Subdivision XXXVIII of the bill (R. 78), recites that, by the Act of June 25, 1929, all unsatisfied indemnity selection rights claimed by defendants, together with all claims to additional lands under the land grant acts, were declared forfeited. By the prayer, subdivision XLII, R. 80, the court is asked to decree forfeiture. The answer, (R. 246), alleges that the so-called forfeiture violates the Fifth Amendment; that the right to forfeit, if it ever existed, had been waived by the United States more than 50 years ago.

The Master reported that defendants' pleas of waiver and acquiescence against forfeiture should be sustained and his report was adopted by the court. See Master's first report (R. 383).

The subject of forfeiture has been repeatedly before Congress. In 1880, the year after extended date for completion, Frederick Billings, President of the Company, addressed (N. P. Ex. 128 (R. 766), J. C. R. 4388) a committee of the House. He stated that if Congress took back the grant the work could not proceed. Smalley's History of the Northern Pacific Railroad, p. 432. In 1882 the 47th Congress deliberately elected not to forfeit. The committee reported (J. C. R. 211) that the Government could do one of two things; (1) It might forfeit the grant pertaining to the unconstructed road and complete the line itself under Section 9; or, (2) it might waive the delay and permit the Northern Pacific to complete the road and earn the grant. The committee reported in favor of the second alternative. The majority report concluded as follows:

"The remaining question, therefore, for us to consider is, 'what is needful and necessary to insure the speedy completion of the road?'

"As has already been stated, 1,180 miles of the road have been completed; 600 or less remain. Work is going on at both interior termini and on the tunnels in the heart of Montana. It appears that 150 miles were approved by President Hayes in 1880, and 325 miles by President Arthur last year. The company asserts that by September, 1883, they will finish the road; that they are progressing as fast as can possibly be done. No testimony or suggestion to the contrary has been made by anyone. Your committee do not see how the transfer of the lands to another company could hasten the completion of the road, nor would it be regarded as advisable for the Government to complete the road by its own direct action. Congress would hardly regard either course as needful and necessary to insure the speedy completion of the road.

"We can conceive of no legislation which would hasten the completion of the road, and therefore recommend none." House Report No. 1283, 47th Cong., 1st Session.

See Master's Report (R. 384, 385). As the Master points out, there had been, prior to 1890, 14 bills to declare forfeiture in whole or in part. Instead of forfeiting, Congress passed the Act of March 3, 1887 (24 Stat. 556), directing the Secretary of the Interior to complete adjustment of the grant. Between 1880 and 1924 more than 30,000,000 acres were patented. The company has transported the property and employees of the Government at reduced rates. The saving at rates fixed by Congress was more than $18,000,000 to 1931. Savings have since accrued at the rate of $500,000.00 per year (R. 811).

(d) It has never before been contended with respect to the Northern Pacific grant, nor, as far as we know, with respect to any other railroad grant, that the company was bound to build the entire line authorized. Section 1 of the Act of July 2, 1864 is, "and said corporation is hereby *authorized* and *empowered* to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line" etc: (Italics supplied.) This language is apt to express authority and power rather than obligation. The grant made by Section 3 is of twenty alternate sections *per mile* in the Territories and ten in the States. But whatever the legal effect of these provisions standing alone, they are conditioned by Sec. 4, as follows:

> "That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every

twenty-five miles of said road is completed as aforesaid."

The Government cannot say, nor has it ever before said, that the company is not entitled to place lands and indemnity earned by construction and acceptance of 25-mile sections. Upon no other hypothesis would the company have been entitled to more than 30,000,000 acres patented since the Act of September 29, 1890 forfeiting this and other railroad grants attaching to *unconstructed* line.

The point has been *stare decisis* ever since the decision in *Van Wyck v. Knevals,* 106 U. S. 360. In that case the grant to the State of Kansas for the use and benefit of the Saint Joseph and Denver City Railroad Company, by Section 3, provided:

> "When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the said company patents for so many sections of said land hereinbefore granted as lie opposite to and coterminous with the said completed sections, and when certificates of the governor aforesaid shall be presented to the Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road the said Secretary shall in like manner issue to said company patents for the said sections of said lands as aforesaid for each of said sections of road until said road shall be completed; *Provided,* that if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right to the lands for said sections so failing of completion shall revert to the government of the United States;

> *Provided further,* that if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States." (pp. 361, 362).

The action was brought by Knevals, a grantee of the Railroad Company, against Van Wyck, claiming under the homestead law. The defendant alleged that the company had not constructed the *entire* railroad for which the grant was made and so was not entitled to any land. The court said:

> "Assuming that the Burlington and Missouri River Railroad, with which the company's road connected, was not, as averred by the complainant, a branch of the Union Pacific Railroad, and that, therefore, the company's proposed road was not entirely completed, the fact remains that the company constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of Congress. Patents for some of the adjoining sections were accordingly issued to the company, and a right to all of them, not specially reserved by the condition of the grant, vested in it. So far as that portion of the road which was completed and accepted is concerned, the contract of the company was executed, and as to the lands patented, the transaction on the part of the government was closed and the title of the company perfected. The right of the company to the remaining odd-numbered sections adjoining the road completed and accepted, not reserved, is equally clear. If the whole of the proposed road has not been completed, any forfeiture consequent thereon can be asserted only by the grantor, the United States, through judicial proceedings, or through the action of Con-

gress. *Schulenberg v. Harriman,* 21 Wall. 44." (pp. 368, 369).

The Rule Applies to Indemnity Rights the Same as to Granted Lands.

Though the court in the above case was speaking of place lands to which title attached at date of definite location, the distinction attempted by the Government between place lands and indemnity lands is without substance. When the company earned place lands, but, because prior rights had attached, could not receive them, *ipso facto* it earned indemnity. The indemnity lands are "lieu" lands. It could not earn lieu or indemnity lands unless it had first earned place lands. The right to select lands is an inseparable concomitant of loss of place lands, for which they are "in lieu" or "indemnity". The *Forest Reserve Case, supra,* holds squarely against the distinction attempted by the Government. The court there said:

> "The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to lands in place, *Payne v. Central Pacific Ry. Co.,* 255 U. S. 228; and it is apparent from the granting act and resolution that 'it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits.' *Weyerhaeuser v. Hoyt,* 219 U. S. 380, 387. Such rights are within the protection of the due process of law clause of the Constitution. *Sinking Fund Cases,* 99 U. S. 700, 718." (p. 64)

Answering the precise contention here made, based upon the fact that title does not attach until selection, and that

settlers in the meantime might take the lands, the court said:

> "But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the Government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits." (p. 65)

So, when the company earned the place lands, it perfected its right to indemnity or lieu lands. If anything was settled by the *Forest Reserve Case,* it is that indemnity lands needed to satisfy a deficiency in the grant can no more be appropriated by the Government than place lands. Prior to selection only claimants under homestead laws could obtain a better right. After selection the company's rights were superior to those. *Weyerhaeuser v. Hoyt,* 219 U. S. 380.

If more be needed to prove how unsubstantial the Government's attempted distinction is, let it be remembered that where all the indemnity lands are insufficient to supply the losses, the former are of necessity appropriated to the grant and no selection is required. The court, in the *Forest Reserve Case,* p. 65, so holds, citing and quoting from *St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co.,* 139 U. S. 1, said:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judg-

ment of the Secretary in selecting from them, for they were all appropriated."

It has been shown that there was a deficiency on March 1, 1898, when the withdrawals began, which has continued to exist. Although, by the express provisions of the grant, settlers could have taken the lands before selection, they were, as between the Government and the company, irrevocably devoted to the satisfaction of the grant. The rule has been for many years firmly established, as shown by the cases cited on p. 66 of the *Forest Reserve Case.*

The Master, in discussing forfeiture, first Report, R. 384, said:

> "I am of the opinion, therefore, that not only the grant of place lands but the right to make indemnity selections are within the conditions. This being so it follows as of course that the validity of any attempted forfeiture of such indemnity rights is determinable by precisely the same rules as an attempted forfeiture of lands in place. For it is not open to doubt that the right to select and receive other lands for those lost is a property right of equal value to the same acreage in lieu of which they were allowed to be selected. If, however, this view is not perfectly correct then by no possibility is the right to make the indemnity selections forfeitable. If it is forfeitable at all it is because it is a condition, failure to comply with which avoids the right. If it is not this it is no more than a simple term of the contract to which by no possibility the right to forfeit attaches."

In *Wisconsin Railroad Co. v. Price County,* 133 U. S. 496, the question was whether the railroad company had to pay taxes on place lands opposite constructed road prior to issuance of patents. The court said:

"The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that *the grant was relieved of possibility of forfeiture for breach of them;* they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possession." (p. 510, Italics supplied.)

St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, was an action by the Northern Pacific to establish its right to certain lands against the St. Paul & Pacific, also claiming under a railroad grant. A contention of defendant was that the title of the Northern Pacific was not perfect until issuance of patent. The St. Paul & Pacific based its contention on Section 4 of the Act of July 2, 1864 providing that whenever twenty-five miles of the road are completed in a good, substantial and workmanlike manner, and the commissioners appointed to examine the same have made a re-

port to that effect to the President and the President has approved and accepted the road, patents shall be issued "confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road." It was urged that this provision was inconsistent with the theory that title to the lands vested on definite location of the line. The court held that title vested as of date of definite location. Speaking of the legal effect of the patent, the court said:

> "There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section, *but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them.* They would also obviate the necessity of any further evidence of the grantee's title. As deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession." (p. 6, Italics supplied.)

So it is clear that the Government's point 4 is opposed to the quoted decisions. It is but a renewal of a contention settled against the Government more than fifty years ago. Of course, no other ruling could have been made. By Section 4, the company is entitled to patents as each 25-mile section is completed and accepted by the President. The patents evidenced and confirmed the company's fee title and enabled it to convey a perfect title to a purchaser. It had to be so, for otherwise the company could not have converted its lands into money with which to construct the line. By the Government's present contention,

the company must have completed every mile of more than 2,000 miles before it could raise a single dollar from its land grant. Yet the grant was for the stated purpose of aiding the company to construct the road. To sustain the Government's position would be to defeat the purpose of the Act. So far from being required to complete the 2,000 miles of line before receiving lands earned by construction, the company did not even have to locate the entire line. Speaking to this point, the court in the *St. Paul & Pacific Case, supra,* said:

> "The contemplated railroad from Lake Superior to Puget Sound was about two thousand miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company." (pp. 18, 19)

This and similar grants have always been construed and administered by the Land Department in this sense. Patents to place lands and indemnity lands have been issued as earned by construction of 25-mile sections of line. The Master's first report (R. 302) shows that the company had received patents for an immense area by construction of approximately 600 miles in Minnesota and Washington completed prior to 1875. At R. 268, the Master shows that in 1875 the company had about 575 miles of railroad free from encumbrance, "with an attaching domain of something like 10,000,000 acres of land", and again, R. 269:

> "As 25 mile sections of the road were completed commissioners appointed by the President examined and reported upon it and it was accepted, and the land grant earned thereby was certified for patent, where surveyed."

The departmental construction will be followed by the court unless plainly wrong. *Hewitt v. Schultz,* 180 U. S. 139; *Burnet v. Chicago Portrait,* 285 U. S. 1; *United States et al. v. Missouri Pacific R. R. Co.,* 278 U. S. 269. In *Cramer v. United States,* 261 U. S. 219, 227, the court said:

> "That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department to which, in land matters, this Court has always given much weight. *Midway Co. v. Eaton,* 183 U. S. 602, 609; *Hastings & Dakota R. R. Co. v. Whitney,* 132 U. S. 357, 366."

The *Eastern Terminus Case,* 177 U. S. 435, is identical, except only that there the line was afterwards actually constructed. The Government there contended that, "when a statutory grant contains, on the face of the law, a provision that each and every grant, right and privilege are upon condition that the road shall be completed within a certain time, and that expires without performance of the condition, all future proceedings of the company, even if acquiesced in and approved by executive officers of the Government, in disregard of the forfeiture, are unauthorized, *ultra vires* and forbidden" (p. 439). The court held, following *Schulenberg v. Harriman,* 21 Wall. 44, that failure to build the road within the period prescribed by Congress did not work a forfeiture, but merely authorized the Government to forfeit by judicial proceedings or Act of

Congress, citing *Van Wyck v. Knevals,* 106 U. S. 360 and *St. Louis &c Railroad Co. v. McGee,* 115 U. S. 743. After construction of the road the right to forfeit is lost.

(e) That the road from Wallula to Portland was not constructed and the grant therefor forfeited can have no effect on the company's right to compensation for the indemnity lands.

The Columbia River line, it is true, was not only not completed on or before July 4, 1879, it was not even definitely located. The General Forfeiture Act of September 29, 1890 ended all obligation of the Government and right of the company with respect to a land grant therefor. The withdrawals occurred many years later. The Government did not then or thereafter, nor until its brief was filed, say that it had a right to make the withdrawals because the Columbia River line was not constructed. If that circumstance were thought to authorize the withdrawals, it could have been urged in the *Forest Reserve Case.* Since 1890 Congress has legislated more than a score of times on the assumption that the company had performed its contract and was entitled to the lands. Master's First Report (R. 385). This court has decided more than thirty cases on the same assumption. Finally, in the *Forest Reserve Case,* this court said:

> "A third of a century already has elapsed since the company earned the right to receive what was intended by the grant." (p. 67).

The Government contends that the General Forfeiture Act of September 29, 1890 has no application to the Northern Pacific. It states three supposed reasons. We will briefly discuss them:

First, that the act applies only to lands title to which has passed and as to which it may be "resumed". The act reads:

> "There is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, *for the construction or benefit of which such lands were granted.*"

In *United States v. O. & C. R. Co.*, 176 U. S. 28, it is held that failure to locate the Columbia River line and forfeiture by the Act of 1890, freed the land from any claim by the Northern Pacific, and so it passed by the subsequent grant to the Oregon & California Company. At p. 49 the court said:

> "Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented."

Until the forfeiture of 1890 the company had the right at any time to locate, construct and earn the grant. *United States v. Southern Pacific*, 146 U. S. 570, 606. The O. & C. could not have acquired an interest in the appurtenant lands but for the forfeiture act of 1890. This is sufficient to prove that the 1890 act did work a forfeiture or abrogation of the right to earn the grant for unconstructed line. *United States v. Southern Pacific, supra*, is conclusive.

See too *United States v. Laughlin*, 249 U. S. 440, 442, which involved a tract of land opposite this portion of the line, where the court said:

> "No map of definite location of this particular portion of the proposed railroad was ever filed; this portion never was constructed, and the grant as to it was forfeited by Act of Congress of September 29, 1890, c. 1040, 26 Stat. 496."

Second, that the act had no application to the Northern Pacific or to the Wallula-Portland line as there had been no map of definite location filed. What has just been said dispose of this question. Forfeiture of lands coterminous with the unbuilt line was the same as to say that there was to be no forfeiture of lands opposite constructed line. That Congress had in mind the Northern Pacific grant is conclusively shown because in the fifth section certain lands within the forfeited portion of the Northern Pacific grant were saved to settlers who had contracted with the company. The same section confirmed a deed of conveyance by the company to the city of Portland.

Third, that Congress in the enactment of the forfeiture act showed no intention to waive any existing rights. This contention simply begs the question. It is not an argument at all. By 1890 the remainder of the line had been completed and the grant earned.

The circumstances attending the passage by Congress of the Act of 1890, standing alone, furnish a conclusive demonstration that the United States waived the right to forfeit any more lands than were forfeited by that act.

In the year 1890, fourteen forfeiture bills were introduced in Congress. Some of them related to all grants

then in default and some of them related solely to the Northern Pacific grant. These bills were all merged in Senate Bill 2781, as appears by the Congressional Record. When that bill came before the Senate, Senator Berry offered an amendment to Section 1 to declare a forfeiture of all land opposite roads not constructed within the time specified in the grant. In support of this amendment the Senator referred to the Northern Pacific grant and stated that he favored forfeiture of all lands opposite roads constructed out of time. The amendment was rejected by the Senate—Cong. Rec. Vol. 21, pp. 3770, 3771.

Senator Berry then offered an amendment consisting of a new section to provide that:

> "Nothing in this act shall be construed as confirming the title of any lands to any railroad company when such road was not completed and in operation within the time specified in the Act of Congress making such grant."

The amendment was debated. Senator Plumb stated that his objection to the amendment was this:

> "That provision was put in some years ago when there were fewer questions underlying all this dispute as to land grants than now. I am not arguing now why it is not in the act but I am arguing why it has not been put in this bill. This is, or ought to be, a final declaration of Congress upon its right to forfeit lands. We have proceeded all the time upon the theory that Congress could not forfeit lands which had been earned by the construction of railroads. I use the term earned, of course, in the common sense. * * *
>
> "The only effect of the adoption of an amendment of this kind would be to keep this question open, to leave it hanging as a cloud over any title which has

heretofore been conveyed or which may hereafter be conveyed to the railroad company, disturb and prevent settlement and make this question the prey of legislation, or of proposed legislation, for all time to come."

The amendment was laid on the table (p. 3772).

A similar amendment was offered by Senator Walthall which was also laid on the table (p. 3773).

The bill as amended passed the Senate April 29, 1890 (p. 3971).

The Senate Bill 2781 was passed by the House with the amendment reserving the right of further forfeiture which had been rejected by the Senate (Cong. Rec. Vol. 21, p. 7389). The Senate did not concur in the House amendment (p. 7393), and conferees were appointed. The Committee reported a bill which did not reserve the right to forfeit. The report was debated at length both in the Senate and House.

Senator Morgan spoke of the bill as confirming the title to lands liable to forfeiture rather than to forfeit lands, and said that it makes no difference what title it wears or what title it passes under, that is the effect of the bill (p. 9957). The Senate concurred in the report of the conferees (p. 10085).

When the report came up for consideration in the House, Mr. Payson of Illinois said (p. 10422):

"Section 7 of the original bill which provided that nothing in this act contained shall be construed to prevent any subsequent Congress from declaring further or other forfeitures if it should be deemed desirable, has been stricken out of the bill by the action of the conference. That proposition was offered in the Senate and by a yea and nay vote was rejected by a

large majority. In the House it remained in the bill but the conference committee agreed that it might be omitted for the reason that the bill without it was exactly as strong as with it, as the provision gave no rights to Congress which Congress did not already have."

However, there were other views concerning the effect of striking out Section 7.

Mr. McRae said:

"Whatever we may now do will, in the language of the gentleman from Illinois, be a finality. Not only will that which you forfeit be put behind you, but all the lands co-terminous on the roads built out of time will also be behind you. It would have been much better if this section had never been in the bill than that it should have been adopted and now be stricken out."

Mr. McRae desired to move to instruct the conferees to restore this section to the bill; but that was objected to (p. 10422-10423).

Mr. Holman, one of the House conferees who did not sign the report, stated his reasons (p. 10423):

"The House is aware of the fact that two different propositions have been presented with regard to the forfeiture of these land grants, beginning with the first session of the Forty-Eighth Congress. The House has declared over and over again in every Congress until this Congress that the least forfeiture that ought to be made would be all of the lands not earned by the railroad corporations within the time prescribed by law; and gentlemen will understand that the amount of land involved in that proposition is now 53,741,596 acres, in addition to the 50,987,840 acres declared for-

feited by the Forty-eighth, Forty-ninth and Fiftieth Congresses. The House never varied from that position until the present session of Congress. Gentlemen, of course, understand all that.

"The Senate repeatedly insisted that the forfeitures should be limited to lands 'not now earned' and to which the railroad companies have no pretense of claim—lands opposite portions of the roads never constructed and as a general rule never intended to be constructed. When this subject was discussed in the last Congress, the seventh section of the present House substitute was in the bill of the Senate, reserving expressly the right of Congress to declare further forfeitures; I stated then that it meant nothing; that if you passed the bill declaring the forfeiture of the lands 'not then earned' it would be the end of the controversy, and the patents would be issued; that the General Land Office would proceed at once to close the accounts and issue the patents to the corporations for all the lands not embraced in the bill. And the gentlemen for Illinois (Mr. Payson), in answer to a question, stated distinctly that this provision was of no real value; that as a matter of course Congress, if it had the power to declare further forfeitures, would do so if it thought proper to do so thereafter.

"I stated distinctly then, and I state now, that if the bill should pass with this seventh section in it no actual rights would be reserved, and the effect of the passage of the bill would be the same; that it would still confirm the whole of the more than 53,000,000 of the acres of land which this House has declared over and over again; up to the close of the last session, ought to be forfeited by Congress."

Mr. Wheeler said (p. 10425):

"But, Mr. Speaker, if that section will do no harm why take it out? Why not leave it in the bill? We

think it will do good. Suppose this matter were before a court, and the court should have the fact brought before them that the highest legislative body in the world struck out that provision, would not the court say that that was a legislative declaration on the part of this body intended to cut off any further effort at legislation on the subject?"

On page 10431 Mr. Wheeler said:

"In my opinion the effect of that striking out would be construed by a court as an expression upon the part of the law-making power of a legislative determination that this forfeiture should be regarded as the final action on the part of the Government."

The minority of the Public Lands Committee of the House in 1890 recommended the rejection of the Senate Bill which was nevertheless adopted, and in their minority report, referring to the Senate Bill which became the act of September 29, 1890, said:

"It is very generally agreed that if the Senate bill is passed and the other bill is not passed at this session, *that means the end of all forfeitures.*" (House of Representatives Report No. 1179, 51st Cong., 1st Session.) (Italics supplied).

These debates prove that Congress deliberately refused to declare a forfeiture of any lands or rights earned by constructed line.

Failure to construct the Columbia River line was no more than a breach of condition subsequent. The consequences are no different than those which attend the failure to complete the constructed line within time. Forfeiture for breach of condition subsequent is a drastic

remedy. It will be decreed by a court of equity only in extreme cases. *O. & C. R. Co. v. United States,* 238 U. S. 393; *Eastern Terminus Case,* 95 Fed. 864.

Notwithstanding that the Government has shifted its position in this court and does not rely on failure to build the constructed line in time as it did below, we will briefly discuss that contention.

In *Atlantic and Pacific R. R. v. Mingus,* 165 U. S. 413, the court said, quoting from *Ruch v. Rock Island,* 97 U. S. 693:

> "In this case it was said by Mr. Justice Swayne that 'it was not denied by the plaintiff that the title had passed, and that the estate had vested by the dedication. If the condition subsequent were broken, that did not, *ipso facto,* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture." (p. 431)

Further the court said in the *Mingus Case* that the practice of forfeiting by legislative act is well settled though it may not be exercised arbitrarily and the grantee may set up in defense any pertinent facts. The court said:

> "It would comport neither with the dignity of the Government nor with the constitutional rights of the grantee, to hold that the Government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the Government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

The rule was applied to the Northern Pacific grant in the *Eastern Terminus Case, sub nom., United States v. Northern Pacific Railroad Co.*, 95 Fed. 864, 177 U. S. 435, decided April 16, 1900..

(f) *The United States is estopped to declare a forfeiture for failure to build the road in time.*

Breach of condition subsequent for failure to perform in time does not work a forfeiture. Affirmative action by the grantor is required. The leading case which considers forfeiture for breach of condition subsequent in a railroad land grant is *Schulenberg v. Harriman*, 21 Wall. 44. In *St. Louis etc. Ry. Co. v. McGee*, 115 U. S. 469, 473, the court said:

> "It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. *United States v. Repentigny*, 5 Wall. 211, 267, 268; *Schulenberg v. Harriman*, 21 Wall. 44, 63; *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 49, 66; *M'Micken v. United States*, 97 U. S. 217, 218; *Van Wyck v. Knevals*, 106 U. S. 360."

The United States is as fully bound by the law of grants as any other party entering into contractual relations. It may grant upon condition subsequent, may enforce or waive the condition. This is but to say that the United States is as firmly bound by its contracts and obliged to

perform them as an individual. *Sinking Fund Cases,* 99 U. S. 700, 719. Speaking of the Union Pacific grant, the court said:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

Cited and followed in *Forest Reserve Case.*

In *Davis v. Gray,* 16 Wall. 203, 232, the court considered a railroad grant by Texas. It said:

> "When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Conditions subsequent annexed to railroad grants by the Government have exactly the same incidents as like conditions annexed to grants by individuals. Congress may deal with public lands precisely as the individual may with his private property. *Camfield v. United States,* 167 U. S. 524. In *United States v. Midwest Oil Company,* 236 U. S. 459, the court said:

> "Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an 'implied license growing out of the custom of nearly a hundred years.'" (p. 474)

The Government, by its point 6 (Brief 120), states that it "is not barred from any of its defenses by * * * estoppel, acquiescence, waiver or otherwise." This is the

same as to say that the Government knows no law and is not bound by its contracts.

In *Davis v. Gray, supra,* a condition subsequent was annexed to the land grant. The court said, p. 232:

> "Breaches of such conditions may be waived by the grantor expressly or *in pais.*"

In *United States v. D. & R. G. W. R. Co.,* 16 Fed. (2d) 374, the Circuit Court of Appeals held that the United States had waived and was estopped to claim forfeiture of the grant for a section of railroad as to which it had stood by and permitted reconstruction.

In the *Eastern Terminus Case,* the Court of Appeals assumed that the question of forfeiture of the grant for the portion of the road between Thompson Junction and Ashland was presented, and held that Congress, having stood by and permitted the railroad to be built out of time, could not be heard to say, ten years later, that the grant was forfeitable. The court said:

> "The act of the railroad company in building its road and receiving the land pertaining thereto was commendable. If one is unable to perform his promise at the time agreed upon, it is not wrong, either in morals or in law, but eminently just and right, that he should perform it thereafter, especially when the promisee accepts and requests it. Courts of equity sometimes enforce the specific performance of a contract, but they never undo its execution when it has been performed on the one hand, and its performance has been accepted on the other, with a full knowledge on the part of both parties of the facts which conditioned its completion." 95 Fed. 880-881.

This court held that the question of forfeiture was not presented because mere breach of condition subsequent would not work a forfeiture. See 177 U. S. 435. Affirmative action to declare a forfeiture is required.. However, the court took occasion to remark:

> "Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed."

In *Maryland Steel Co. v. United States,* 235 U. S. 451, this court held that in case of contracts authorized by law necessarily entered into and conducted by officers of the Government, the Quartermaster General might waive time of completion of a vessel and so bind the United States to performance. Citing *Salomon v. United States,* 19 Wall. 17.

There cannot be found an adjudged case in which a forfeiture was even asserted, much less permitted by the court, where the alleged breach of condition subsequent had been so completely and advisedly waived by the grantor. From 1880 to 1887, from one to nine years after grounds for forfeiture existed, the Government, with the fullest knowledge, stood by and permitted and encouraged the company to complete its line at enormous expense. The estimated cost of the land grant portion of the line at date of hearing before the Joint Committee was given as $300,000,000. Each section of road was examined by commissioners and accepted by the President. Patents for millions of acres of place and indemnity lands have been delivered. The

Government, through Congress, the executive and the courts, by its every department, has treated the contract as in effect and the time provision waived. Master's first report, (R. 384). Even if, as mooted by this court in the *Eastern Terminus Case*, there be a doubt of the power of minor administrative officers to waive time for completion, there is no question of the power of Congress, for it has full power over the public domain. The company did complete the line, and it was accepted. The Government doubled the price of its even sections. It has enjoyed reduced rates to the amount of $18,320,448.15 to December 31, 1931 (R. 811), and continues to enjoy reduced rates to the amount of about $500,000 per year. We also mention the advantage it received from settlement of the country and admission of three states into the Union in 1889, years before otherwise they would have been.

It is noticeable that the claim for forfeiture is more insistent now than before the line was completed. Prior to completion it was not difficult to convince Congress that the lands should not be forfeited and so construction stopped. It is likewise noticeable that under no circumstances and at no time was it ever proposed nor even now proposed that the Government surrender or restore or in any way compensate the company for the benefits received; nor that the valuable right to land grant rates be released.

The agitation for forfeiture culminated in the General Forfeiture Act of September 29, 1890 (26 Stat. 496) which, by Section 1, provides that

> "there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad op-

posite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted."

Section 3 makes provision for protection of persons who had acquired from the Northern Pacific title to certain of the lands within the forfeited area. By the Act of 1890 Congress exercised the only right of forfeiture it had or even claimed to have. From 1890 to June 25, 1929, a period of 39 years, Congress passed 34 acts, each and every one of which recognized the completion of the railroad and the right of the company to its land grant. Not only that, but in a score of cases in this and other courts, to which the United States was a party, it has been alleged time and again that the Northern Pacific had constructed its railroad, had earned the land grant, and about 38,000,000 acres were accordingly patented. Finally, in the *Forest Reserve Case*, this court once again decided that the company had completed its contract and earned the lands; that the provision for indemnity was as much a part of the grant and contract as the provision relating to lands in place; that the company's right to indemnity was protected by the due process clause of the Constitution from impairment or destruction.

In accordance with the decision in the *Forest Reserve Case*, the land office tentatively found (JCR 250, 251) that the company was entitled, as of December 31, 1921, to 2,703,270.12 acres by the grant of 1864 and 1,230,442.39 acres by the grant of 1870, to be satisfied from the with-

drawn lands. Then it was that E. A. Sherman, Acting Forester, proposed the indemnity rights should be forfeited. By his letter, dated January 12, 1924, to the Commissioner of the General Land Office (JCR, Vol. 1, p. 9), objecting to the proposed adjustment, at p. 24, he said:

> "I am satisfied that the courts would not regard a limited forfeiture as inequitable in view of the many concessions the Northern Pacific has received over and above those contained in its original grant. This feature of the case is therefore presented for your consideration."

At p. 25 the Acting Forester said:

> "There are now within the boundaries of the national forests in Montana, Idaho and Washington approximately 2,500,000 acres of odd-numbered sections of land within the indemnity limits of the Northern Pacific grant. These lands have been considered by Congress the property of the United States for a great many years. * * * These national forest lands hang in the balance and they should be *saved* to the United States if it is possible to do so." (Italics supplied).

So that it was not until this court held that the company had fully performed its contract and was entitled to the indemnity lands withdrawn for Government purposes, that the so-called "limited forfeiture" theory originated with the Acting Forester. Even he did not say that the company had not earned its land. He proposed to offset its admitted right against some supposed, unspecified, and unknown "concessions". The record made by the Government in this case is not one of which it can be proud.

This is not the first time the Government has invoked its supposed generosity as a reason for depriving a rail-

road grantee of its rights. The plea was made before and has long since become stale. In *United States v. Union Pacific*, 98 U. S. 569, 619, this court answered the same argument as follows:

> "The liberal manner in which the government has aided this company in money and lands is much urged upon us as a reason why the rights of the United States should be liberally construed. This matter is fully considered in the opinion of the court already cited, in *United States v. Union Pacific Railroad Co.* (*supra*), in which it is shown that it was a wise liberality for which the government has received all the advantages for which it bargained, and more than it expected. It must, however, be admitted that it has fulfilled the purpose of its creation and realized the hopes which were then cherished, and that the government has found it a useful agent, enabling it to save vast sums of money in the transportation of troops, mails, and supplies, and in the use of the telegraph.
>
> "A court of justice is called on to inquire *not into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the settled principles of equity, and to decide accordingly.* Governed by this rule, and by the intention of the legislature in passing the act under which this suit is brought, we concur with the Circuit Court in holding that no case for relief is made by the bill."

3. MINERAL CLASSIFICATION.

Government's point 1, Brief, 46, is as follows:

> "1. The Company cannot maintain its claim for compensation for loss of indemnity selection rights because that claim is based solely on a false classification of land as mineral procured through the Company's own fraud and corruption."

Prefatory to our discussion we observe that now the Government charges all the fraud and corruption on the company, whereas, heretofore it involved its own officers in the charges as the principal delinquents. We will discuss this subject under the following points:

(a) Master's report —. As to the kind of examination required by the Act, p. 62.

(b) As to timber contract, passes, and railway agents accompanying the commissioners, p. 64.

(c) The Master's ruling, p. 65.

(d) The charge that the company caused lands to be wrongfully classified mineral is inherently incredible and obviously incorrect, p. 68.

(e) Decision of District Court, p. 69.

(f) The classification is conclusive until set aside, p. 70.

(g) The Government is estopped by its delay and has waived the pretended fraud and ratified the classifications, p. 74.

The statement of facts in appellant's brief is incomplete and inaccurate. Subdivision XXVIII of the complaint, R. 60, refers to the Act of February 26, 1895, (28 Stat. 683) providing for classification of place and indemnity lands within the Coeur d'Alene, Idaho, Bozeman, Helena,

and Missoula, Montana, land districts by commissions of three members for each district. Section 6 is in part as follows:

> "Sec. 6. That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification."

It is alleged that the commissioners undertook classification of approximately 11,500,000 acres, and did pretend to classify the same; that the reports of the classification were filed and approved by the Secretary of the Interior; that of the lands pretended to be classified, 3,782,377.90 acres in place limits were classified as mineral and the classification approved; that in lieu of those lands the Northern Pacific selected and received patents for 1,330,762.65 acres; that the company now claims the right to select lands to the amount of 2,451,615.25 acres; that the company has received by and from said 1,330,762.65 acres of mineral indemnity lands so selected a total value equal to or in excess of the total value of all of the 3,782,377.90 acres of lands that were classified as mineral. It is alleged that by reason of the matters and things set forth the company is not entitled to any additional lands or monies from the United States by reason of the classification.

Defendants' answer contained a demurrer, denials, and pleas of waiver and estoppel (R. 229) stating that the matters alleged have been fully known to plaintiff for more than 30 years; that plaintiff has not sought a reclassification but has withdrawn and retains for national forests 2,894,823.43

acres from place limits which were classified as mineral; has sold more than a million dollars worth of timber from the lands; has disposed of 65,155.47 acres through mineral entries, and of 455,048.03 acres through non-mineral entries; that in 1908 the charge that the mineral classification was fraudulent and worthless was fully investigated and considered by the Secretary of the Interior; that, with full knowledge, plaintiff affirmed the classification and issued patents to defendants for indemnity lands based on said classification. For a fuller statement of the pleadings, see Master's first report, (R. 341).

The complaint has more significance for what it omits to allege than for what it alleges. It does not allege that all of this land classified mineral was wrongfully classified. In fact, *it is not alleged that one single acre was incorrectly classified mineral.* It is only alleged that the company's agents importuned and induced the commissioners to classify with reference to value, and that the commissioners *to some extent* acceded. But we emphasize that plaintiff not only does not allege that the lands classified mineral *were not in fact mineral, it most carefully refrains from making that allegation.* The reason, of course, is obvious. The Government does not wish a reclassification of the 2,894,823.43 acres placed in forest reserves, the 65,155.47 acres disposed of through mineral entries, or of the 455,040.03 acres disposed of under non-mineral entries. If it should allege that these lands were in fact non-mineral, and should have been classified accordingly, *it would by that very allegation establish the company's right to all such lands.*

(a) *Master's Report: As to the kind of examination required by the Act.*

It is charged that the reports made by the commissioners to the Secretary that they had been personally on the land were false and that the company is attainted because it did not advise the Secretary thereof. The Master (R. 685), shows that each commissioner was paid but $10.00 per day out of which he had to pay his transportation and subsistence, and as the total salary could not exceed $2,500 per year, it could not have been contemplated that the commissioners should have been actually engaged in the work for more than 250 days a year for the four years of the classification. But, because of snow conditions in the mountains of Montana and Idaho, he said that 200 days would be the limit for field work. The total area to be classified was 11,500,000 acres. To complete the work within four years would require classification of 2,875,000 acres per year, or 718,750 acres per year by each board, or 3,593 acres each day by each board. As the Act and instructions required, said the Master, that the classification was to be made by 40 acre subdivisions where surveyed and in substantially equivalent tracts where unsurveyed, merely walking across in a straight line would require twenty-two miles of travel per day even if the commissioners were at the point where the examination commenced. The lands are in the Rocky Mountains where travel is attended with the utmost difficulty even for men especially inured and trained. The Act, by Section 3, provides that all lands shall be classified as mineral which by reason of valuable deposits are open to exploration, occupancy and purchase under the mineral laws, and that the commissioners in making the classifica-

tion shall take into consideration mineral discovered or developed on, or adjacent to, the land, the geological formation of the lands to be examined and classified, and of the lands adjacent thereto, and the *reasonable probability* of such lands containing valuable mineral deposits because of formation, location or character. It is plain, said the Master, that merely to walk across the land would give no adequate information. It is obvious that no such quantity of land as was necessary could have been classified, even by men of skill and knowledge, and the commissioners had no such knowledge of the subject. The Master said at (R. 340):

> "It is obvious then that to give this statute a reasonable and sensible construction it must be held that all that was intended was a rough survey or inspection by men without any special training for the work, and a consequently rough determination of the lands to be excepted from the grant as mineral."

The Master said that it is obvious that many mistakes must have been made. He said:

> "Indeed, I think that a great portion of the land must inevitably have been mistakenly classified, even by men seeking honestly, diligently and employing the very best means and agencies at hand, to determine correctly." (R. 340)

The Master said that the commissioners might have determined with a fair degree of accuracy what lands were *agricultural*. The Master said:

> "Setting aside, therefore, as probably approximately correct, land classified as agricultural, it seems certain that frequent gross and easily discoverable errors must

have crept into the classification of the remainder of the lands." (R. 341)

Therefore, the charge that the commissioners falsely reported that they had been on the land, and that the railway agents had a duty to advise the Secretary of such falsity, is meaningless. In fact, by plaintiff's own averments, the falsity of the report that the commissioners had been on the land appeared from the reports, for it is charged that the areas they claimed to have examined were too large to have been examined within the time reported; and further, that the lands were then buried in snow. *The Secretary could not possibly have been misled by the reports.* Nor was there any duty of the railway agents to advise the Secretary of what appeared from the reports themselves.

(b) *As to timber contract, passes and railway agents accompanying the commissioners.*

The Master held that the timber cutting contract with commissioners Crane and Goode of the Coeur d'Alene District sufficiently charged fraud for the time the contract was in effect and with respect to the lands which they examined. But, said the Master:

> "It is evident, however, that as reports were made by subdivisions it would be easy for the Government to determine the precise lands classified during the life of that contract, and to specify which of those lands had been misclassified. The subdivision, however, does neither. It contents itself with the allegation of fraud, and with the resultant misclassification in some quantities." (R. 345)

The Master also held (R. 345), that the giving of passes to the commissioners may in fact have resulted in influencing the classification. He observed however, that there was no law at that time against the railroad giving passes, and said that no doubt the Congressmen who passed the act had passes, as well as the Secretary of the Interior and other officials. The Master ruled that the giving of passes might or might not have influenced the commissioners. He said:

> "I feel, therefore, that it is a question of fact to be determined upon all the evidence the purpose for which the passes were given and the actual effect in the classification the receipt and use of passes had." (R. 346).

In view of the fact that the vast majority if not all participants are now dead, the futility of such an inquiry is apparent.

The Master said that the charge that company agents were with the commissioners, importuned them to classify as mineral or non-mineral on the basis of value, and that they acceded in some degree to these importunities, taken with the alleged facts that the reports were false, sufficiently charges fraud on the part of the commissioners and perhaps connivance therewith by the agents. He said:

> "The subdivision, however, does not state other than by the term 'in many instances' the extent to which that fraud resulted in the misclassification." (R. 345)

(c) *Master's ruling.*

The Master said (R. 346), that he would overrule the demurrer if it were not for the position taken by the Government. He refers to the correspondence with Government counsel as to the relief claimed. It was counsel's

position that, although the Government was entitled to have the classification set aside, it does not ask that relief. Counsel said it is impossible to restore the status quo. It was his position that, as the value of the indemnity lands equals the value of the lands that were classified mineral, the company should be denied the right to select any additional lands (Report, R. 346-347). The Master said that, under Section 6 of the Act, the approval of the classifications by the Secretary is final, except in case of fraud; and by Section 7, that issuance of patents is prohibited until the lands have been classified. The Master said:

> "So far as lands are fraudulently classified they revert at once to their previous status, that is, become at once *unclassified lands* subject to the rules of law regulating their further disposition as mineral or non-mineral under the grant of the company. This is the only result declared by the Statute. I can see no room to inject another or different." (R. 347). (Italics supplied).

The Master said further (R. 348) that, in a suit attacking the classification by either party as fraudulent, the established principles of equity govern, such as waiver, delay, election and altered conditions, and every remedy accorded by settled practice in equity is open, and no other. The Master said:

> "These established doctrines or the available remedies are changed not one whit by the classification statute or by the land grant to the company; and, therefore, upon the question in this subdivision, if fraud be sufficiently alleged, the only possible inquiry is what remedies may the Government have. Under settled principles, one claiming to have suffered from fraud may in equity sue to set aside the transaction

and if it cannot be wholly set aside, set it aside in part and recover damages for that portion which cannot be undone. He may, on the other hand, affirm the fraud and sue at law for his damages; or, equitable principles being otherwise present sufficiently, may sue therefor in equity. Assuredly this is the sum total of the remedy which a person claiming to be the victim of a fraud has ever had or may now have under any principle of law. As already stated, the only effect of the fraud provision in the classification statute being to relieve it of finality it follows that neither under the statute nor under general principles of equity may the Government in this case have any other remedy than pointed out in the foregoing. * * * I think, therefore, the Government in this case may have any portion of the classification set aside for fraud. If for any reason a particular tract by reason of disposition or other thing cannot be, upon its proper classification, reassigned then it may have money compensation as being the only other available remedy equity has ever administered in such case. I think, too, it may, upon sufficient proof, have the entire classification undone and the lands retained by the United States and by the railway company, respectively, taken into account in the final adjustment of the grant. Obviously, to obtain either of the foregoing remedies a fundamental change in the whole frame and purpose of this subdivision is necessary." (R. 348).

The Master said (R. 349) if the Government stands upon its present position, the demurrer should be sustained; but, as the demurrer did not go to judgment before him, and as counsel might wish to change its position and seek a proper remedy, he reported only that on counsel's present position the demurrer ought to be sustained. (R. 349).

(d) The charge that the company procured the classification of lands of little or no value as mineral in order to establish mineral losses for indemnity selections, is preposterous on its face. In the first place, the company knew by 1895 that there would be a large deficiency. In *Hewitt v. Schultz,* 180 U. S. 139, 157, it is shown that the Commissioner of the General Land Office issued a certificate dated May 2, 1896, in which he estimated a deficiency of 3,559,222.78 acres which could never be satisfied. It is certain that the company and the Land Department knew there was a large deficiency though the exact amount could not be then computed. It is impossible to believe that the company deliberately sought to increase losses for which it could not obtain indemnity.

It must be remembered, too, that by far the larger part of the vacant lands in the indemnity limits were unsurveyed—and liable to be lost to settlers.

Another circumstance, not mentioned by plaintiff, is that 1,187,740 acres in the indemnity limits were classified mineral. The suggestion that the company wrongfully caused depletion of its *indemnity belts* for which it could receive no lieu lands needs no answer. Neither the complaint nor the brief offer to give back this indemnity land. It does not allege that any of those lands were improperly classified, much less does it allege that the 1,330,762.65 acres of indemnity lands selected and received were of equal value to the balance of the 3,782,377.90 acres of place lands plus the value of 1,187,740 acres of indemnity lands classified mineral. The total mineral classifications, including place and indemnity, were 4,970,117 acres.

(e) *Decision of District Court.*

At the argument of exceptions to the Master's report the District Judge requested Government's counsel to state "just what place the allegations of subdivision XXVIII have in the case, and what office they were intended to perform". We quote from the court's memorandum decision (R. 410), as follows:

> "The result was that counsel for the government (Mr. McGowan) by repeated and definite oral statements asserted that no money judgment was sought by the government in the way of damages for the alleged fraudulent classification, nor did the government ask any reclassification of the lands; that the sole purpose of the allegations in this regard was to give rise to the application of the 'clean hands' doctrine. No motion for leave to amend the bill in accordance with the special master's suggestion has been made. The sole point, therefore, in this aspect of the case is whether these allegations are sufficient to call for the application of the 'clean hands' maxim. Since I fully concur in the special master's opinion that the allegations do not give rise to the 'clean hands' doctrine the demurrer or motion directed to the portion of the bill now under consideration should be sustained and this matter should be stricken from the bill."

No point now is made in this court that subdivision XXVIII does give rise to the so-called "clean hands" doctrine, expressed in the maxim, "He who comes into equity must come with clean hands". The decision of the District Court of the very point upon which the Government relied in the court below is not even questioned in this court. It is elementary that the maxim does not apply to one who

occupies a defensive position. The company has filed no cross-bill and is asking no relief. It is defending against the Government's suit brought at the direction of Congress. The Master's first report (R. 280), discusses this question, and shows that the so-called clean hands doctrine can have no application to this case. No claim of error is made to this portion of the Master's decision by the Government in this court. In this state of the record, the order sustaining the demurrer must be affirmed unless the District Court committed error in the decision of the point upon which the Government rested its case. *Appellant does not even contend that the clean hands principle applies.*

The clean hands maxim:

The maxim applies only to the plaintiff or a defendant interposing a counterclaim. Furthermore, it applies only to the particular transactions under consideration. Pomeroy's Equity Jurisprudence, (Fourth Edition), Secs. 397-398-399; *Clarke v. White,* 12 Pet. 177; *Keystone Driller Co. v. General Excavator Co.,* 290 U. S. 240; *Loughran v. Loughran,* 292 U. S. 216.

The District Court affirmed the Master's ruling.

(f) *The classification is conclusive until set aside.*

The Government, though it shifts its position, changes its ground and mends its hold, does not strengthen its case. In this court it now contends that the mineral classification, being fraudulent, is a nullity throughout. From the alleged nullity of the classifications it concludes that the company has established no mineral losses with which to select the withdrawn lands and so the Government may

keep them. Speaking of the effect of fraud in the classification, the Master said (R. 347):

> "So far as lands are fraudulently classified they revert at once to their previous status, that is, become at once unclassified lands subject to the rules of law regulating their further disposition as mineral or non-mineral under the grant of the company. This is the only result declared by the Statute. I can see no room to inject another or different."

But if the Government refuses a reclassification and elects to affirm a fraudulent classification, it is bound thereby exactly as if there were no fraud. The classification is either set aside or it stands. The Government cannot say the classification was a nullity and at the same time retain what it received thereby. The argument that, as no mineral losses were established by the classification therefore it can keep the lands classified as mineral, is self-contradictory. As the Master correctly said, if the classification is a nullity, the lands revert to their previous status as unclassified lands. It follows, therefore, that *the Government is now contending that it may appropriate unclassified place and indemnity lands.*

To prove how wrong is the Government's contention we need but to establish the status of unclassified lands under the grant. The *Forest Reserve Case* does that conclusively. The Government is required by Section 6 of the Act of July 2, 1864 to survey the lands for 40 miles in width on both sides of the entire line as fast as required by construction of the railroad and the odd sections "shall not be liable to sale or preemption before or after they are surveyed except by said company as provided in this act." Place lands are irrevocably devoted to satisfaction of the grant from

the very moment that the line was definitely located. The Government could not appropriate place lands earned by the constructed line. It certainly did not make any such contention in the court below. If these lands, as assumed by the Government, have the status of unclassified lands, by that very fact they belong to the Northern Pacific unless, of course, actually mineral. *By the Government's present contention it has in the forest reserves 2,894,823.24 acres of place lands to which it has not a pretext of right.* After definite location and construction, the duty of the Government is to survey, classify and patent all lands not mineral. Section 6, Act of July 2, 1864. *It can do this yet if it wishes* except for the Act of June 25, 1929. If the lands were non-mineral in 1895, they still are non-mineral, and vice versa. But the Government refuses to classify. It wishes to retain the lands on the theory that they have never been classified, and at the same time refuses to make a classification, ignoring Section 6 of the charter. Of course, the company cannot survey or classify. Only the Government can do that. See cases cited, *infra,* p. 152. A suit therefor could not be brought against the United States. Cases cited, *supra.* p. 10. Obviously, by the Government's contention, the company might never receive an acre of its grant, for the Government could, by refusing to survey and classify, avoid its obligation to patent a single acre.

It is settled that the Secretary of the Interior and mineral commissioners acted, in the matter of classification and issuance of patents, as judicial tribunals. *United States v. Wildcat,* 244 U. S. 111; *West v. Standard Oil,* 278 U. S. 200; *United States v. Atkins,* 260 U. S. 220. In the *Standard Oil Case;* the court said:

"Where, by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent, as in *Michigan Land & Lumber Co. v. Rust,* 168 U. S. 589, 592; or to certify a list, as in *Frasher v. O'Connor,* 115 U. S. 102, 115-116; or to approve a location for a right of way, as in *Noble v. Union River Logging R. R. Co.,* 147 U. S. 165; or to make a survey and approve a selection, as in *Shaw v. Kellogg,* 170 U. S. 312, Congress, by implication, confers upon the Secretary power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. After issue of the patent, or other like instrument, his findings of fact are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts, *DeCambra v. Rogers,* 189 U. S. 119; *Love v. Flahive,* 205 U. S. 195, 198; and though his rulings on matters of law are reviewable in the courts, *Doolan v. Carr,* 125 U. S. 618, 625; *Wisconsin Central R. R. v. Forsythe,* 159 U. S. 46, 61, they are not subject to re-examination by the Department. Johnson v. Towsley, 13 Wall. 72, 83-84. For in making such determinations he acts as a special tribunal with judicial functions. *Riverside Oil Co. v. Hitchcock,* 190 U. S. 316, 324." (pp. 218, 219)

The Government is proceeding in complete disregard of this well established rule. It seeks to leap over the determination of the mineral classifiers and Secretary of the Interior. Before the Government is entitled to any relief, it must, in a direct proceeding, set aside the determinations. While they stand, they are an absolute bar to the granting of any relief. This is the consequence declared by the Act of 1895 itself. The determinations are to be conclusive except for fraud. Of course, this added nothing to their legal effect, as they would be subject to attack for fraud without

that provision. But the Act does, of necessity, imply that they are final unless and until set aside for fraud.

(g) *The Government is estopped by its delay and has waived the pretended fraud and ratified the classifications.*

The demurrer to the complaint was properly sustained because it appears that the transactions complained of occurred more than 30 years ago and it is not alleged that the Government had no knowledge, nor when it acquired knowledge, nor any other reason for delay in claiming relief. The Master said, Report (R. 348):

> "To the argument that by reason of the lapse of time and changed conditions the Government cannot now obtain full justice it need only be said that its plight is no different from any other litigant, who, being obliged to accept the only remedy open to him may not, frequently is not, made entirely whole. But there is another and conclusive reason against this claim. The delay and the changed conditions in part at least, result from the act of the Government. It has delayed bringing suit and in its pleading offers neither excuse nor reasons for the delay. It has issued patents to the railway company, has approved its indemnity selections and made conveyances therefor, and does not now, in its long delayed suit, undertake to say it was for all the past years uninformed of the facts, nor how and when it discovered them. True it is not required to make these averments, as is an individual to avoid laches. But, assuredly the Government, as much as an individual, where it sets up the results of its own delay and its own conduct as giving it new or unusual rights, must show why it has so long delayed and why it has acted contrary to its present claims.
>
> "But above and beyond all that, certainly the United States ought to offer some reason why it has swept into

the Forest Reserve the greater portion of the lands classified as mineral; why it has controlled and administered them for years and why it now proposes to retain them and does not now tender them for reclassification."

In *United States v. Stinson,* 125 Fed. 907 (7th CCA); 197 U. S. 200, long delay unexplained, death of witnesses, etc. was held to estop the Government from setting aside patents to 40 acre tracts alleged to have been taken by dummy entrymen. That case is not nearly as strong in its facts as the instant case. This court said that:

"The Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."

Other like cases have been cited, *supra,* to the same effect. It is, of course, established that waiver need not be pleaded and may be taken advantage of by demurrer where, as here, the facts appear from the complaint. *Badger v. Badger,* 2 Wall. 87, 95; *Hays v. Port of Seattle,* 251 U. S. 233; *Maxwell v. Kennedy,* 8 How. 221. No better statement of the rule can be found than that of Attorney General Black in *Claim of Reside,* IX Op. Atty. Gen. 198. He said:

"If all these considerations could be set aside, the lapse of time alone would determine the case in favor of Reside's estate. It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason, as well as law, that when a party has lain by with a claim until the evidence concerning it has ceased to exist, and then produces it, the other party

is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved, and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh. I admit that the statute of limitations cannot be pleaded against the Government as a technical bar. I do not speak of that conclusive *legal* presumption which would be created in six years against an individual. But the Government is bound, like anybody else, by the rules of evidence and by the *natural* presumptions arising from the facts of the case. In some countries there are no statutes of limitations; in all countries there are large classes of cases to which such statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, and such lapse of time proves that fact as fully as if it had been attested by credible witnesses. The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred.

"There is no such inpeccability ascribed to a government as will give it a right to deny the evidence. When time testifies against the sovereign it is heard with as much respect as any other witness would be." (p. 204)

Such unexplained delay as appears from the Government's bill of complaint bars relief. The defendants were in no way responsible. The fault lies wholly with the Government. It would be a travesty on justice to permit the Government to take advantage of its own delay and its own fault as a reason why it should have some new and extraordinary rights not belonging to any other litigant nor known to a court of equity.

The defendants plead, moreover, that the United States, with full knowledge, elected to ratify the classifications 30 years ago, and is now estopped. It has been shown that a demurrer was sustained to subdivision XXVIII. The court, therefore, did not consider the pleas of waiver and estoppel or the supporting evidence. As the point was not decided below, we suppose that this court will, following its usual practice, decline to do so. *Lauf v. Shinners,* 303 U. S. 323, 330. It was the view of the District Court that, as the demurrer had been sustained, there was no subject matter to which the pleas could apply. We should say that, although the evidence taken under the pleas is convincing and uncontradicted and established waiver and estoppel beyond controversy, nevertheless, if this court should disagree as to this, that would not dispose of the issue. *The burden would still be upon the Government to prove the allegations of fraud denied by the answer.* The case would have to go back for determination of the fact. Of course, if the District Court's ruling on the demurrer be affirmed, there will be no occasion to consider this subject.

In spite of these considerations we feel that we cannot refrain from discussing the facts that sustain the pleas of waiver and estoppel. They are of public record. The Master reviews the evidence and shows that in 1908 Congress, the President, and Secretary of the Interior were advised that the classification was worthless; that many of the commissioners were unqualified by lack of knowledge and physical unfitness; that on March 11, 1908 a committee of the Montana Mining Association reported fraud in the classification and suggested the matter be laid before the President, the Secretary of the Interior, and Congress, with a view of securing a reclassification. (N. P. Exhibit

59, R. 705). The committee went to Washington, saw the Secretary, filed a report, called upon and complained to the President. Chief Special Agent Schwartz was appointed by the Land Department to investigate the whole subject and made two reports, disclosing all the facts now alleged. One of these reports is N. P. Exhibit 57 (R. 695), dated February 1, 1908, which details many charges of fraud, some of which he says were probably true. He reported that the work was done unscientifically and ignorantly; that the Northern Pacific had sent its agents with the commissioners to examine the lands. He made another report March 12, 1908 (N. P. Ex. 58, R. 699). In this report he went into the question at great length.

Schwartz, in his report to the commissioner, dated February 1, 1908, (R. 695, 697), referring to the charges that the Railway Company had induced the commissioners to classify in its own interests said:

> "However, the classification was not always to the liking of the Northern Pacific Railroad Company, and although it is undoubtedly true that the Northern Pacific field officers obtained considerable influence over the mineral land commissioners, it yet remains a fact that immense bodies of lands in Montana and Idaho were classified contrary to the wishes of the Northern Pacific Railroad Company."
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> * * * * *
>
> "One instance of a classification which was not to the liking of the Northern Pacific is that involved in Contest No. 2179 in which a letter by this office has now been before the Secretary for action for over six months.
>
> "In that classification the mineral commissioners represented that they had made examinations of a strip of country some 25 to 30 miles long and 4 to 10 miles

wide, and classified the land as mineral. As a matter of fact, they alleged to have examined this land during seasons when not even a young, active man with snow-shoes would venture into that country; to say nothing of these broken-down, confederate brigadiers who were on the board of classification. They assumed that the country was mineral simply because it lays south of and was reached from the Coeur d'Alene mining camp.

"In the same way they made a 'guess' as to the mineral or non-mineral character of probably 80 per cent of the lands alleged to have been examined by them."

Agent Schwartz, report of March 12, 1908 (N. P. Ex. 58, R. 699), reported that whether an attack should be made on the classification and reclassification had is another question in the determination of which various factors are to be considered of which he specified seven. The fifth and seventh are as follows:

"5th. An actual inspection of each forty-acre subdivision must necessarily result in finding that immense bodies of land now classified as mineral would have to be (under the terms of the act) classified as non-mineral for the simple reason that there are not now any known deposits of mineral thereon.

"7th. In any re-classification the Northern Pacific would under its grant take title to many odd numbered sections containing timber in amounts sufficient to make them now valuable therefor—the same lands not being considered valuable for timber at the time of the classification in view of the timber land markets at that time, and being now classed as mineral." (R. 704)

His conclusion was that classifications not now final be suspended and issuance of further patents for indemnity lands be suspended until proper examination should be made.

A report of Montana Mining Association, (N. P. Ex. 59, R. 705), was filed with the Commissioner General Land Office March 11, 1908, (R. 705). A committee of three, appointed by said Association, called upon Secretary Garfield and Commissioner Fred Dennett and discussed the charges. (N. P. Ex. 80, R. 726). In said Mining Association report were statements that land agents and attorneys of the Railway Company were always with the Mineral Commissioners, whether they were in the field or engaged in their office work; that the result of the joint endeavors of the Commissioners and Railway Agents was shown in the classification arrived at; that the Railway Company gained title to a large area of valuable timber land, unquestionably mineral in character, and got rid of thousands of acres of worthless land devoid of mineral deposits, (R. 706); that whole townships of land were classified by the Commissioners without going upon and examining the land, (R. 708); that the mineral classification in Montana was worthless and fraught with injury and injustice to miners, and the people in the State in general; that it was tainted with fraud and collusion and was largely manipulated by the Railway Company, its agents and attorneys, (R. 712).

The Montana Legislature, on March 4, 1909, passed a resolution addressed to the Congress, (N. P. Ex. 60, R. 713). In it were statements that the former mineral classification was unscientific, worthless, and made to the detriment of the Government and public; that a just classification of mineral land was of vital interest to miners and prospectors and involved mineral lands of untold millions in value. Congress was petitioned to pass an act for an honest and thorough mineral reclassification (R. 713).

Said resolution was presented by Senator Carter to the Senate March 25, 1909, with request that it be printed and referred to the committee on public lands. That action was taken and the resolution appears on page 258 of the Congressional Record, March 25, 1909. On March 29, 1909, Congressman Pray of Montana presented said concurrent resolution to the House and it was referred to the committee on public lands, (Congressional Record March 29, 1909, Page 556).

Commissioner Fred Dennett, in a letter dated April 23, 1910, (N. P. Ex. 80, R. 725-731), says the attention of the Land Office first was called to alleged fraudulent classification in Montana by report of L. L. Sharpe, Chief of Field Division, Helena, dated February 18, 1908, referring to charges in an article by a Helena attorney in Pacific Coast Monthly of January 1908; that on June 27, 1908, instructions were given to said Sharpe to cause an investigation of certain lands classified as non-mineral; that reports were received from him and his agents, (R. 727). Mr. Dennett states the substance of the agreement reached in conference held by Secretary Garfield and the Railway's representatives, which, in part, was, the Railway Company consented to the setting aside of non-mineral classification of *any land in Montana* if the land had not been transferred by the Railway Company to innocent purchasers, on condition the Railway Company be allowed to submit for reclassification an equal area of land classified as mineral, (R. 728, 729). He says Secretary Garfield had set aside the mineral classification of land in St. Joe District, Idaho, about which the company complained, (R. 729), and says, (R. 730), "It is the purpose to adhere to the terms of the agreement entered

into by former Secretary Garfield, and representatives of the Company."

Northern Pacific Exhibit 83, (R. 737), is a letter written by Thomas Cooper, then land commissioner of the Railway Company. It states that on April 16, 1909, a conference was held for discussion of the mineral classification in the office of Secretary Ballinger, at which were present the Secretary, Commissioner Dennett, Senators Carter and Dixon, Chief Special Agent Schwartz, and Mr. Cooper, (R. 737).

Pursuant to the recommendation of Special Agent Schwartz *further patents were suspended on March 13, 1908.* This action resulted in conferences between Britton & Gray, Attorneys for the Railway Company, and the Commissioner of the General Land Office. The order was modified July 7, 1908 so as to permit issuance of patents on mineral base outside the four land districts. This action is conclusive that the Secretary decided that the charge that the company had obtained classification of worthless lands as mineral in order to select more valuable indemnity lands, was wholly unfounded. The Secretary could not have permitted the use of place lands classified mineral for taking indemnity lands had he believed those classifications fraudulent. Following this action patents were issued for lands located outside the four land districts.

In conformity with the above mentioned agreement of Secretary Garfield certain lands within the four land districts were reclassified and other lands therein remained under the original classification. (See statement of evidence R. 725 et seq.). The agreement is N. P. Exhibits 80, 81 and 83 (Master's report (R. 344). The evidence, beginning at R. 725, shows that the company agreed to a reclassification

of any lands which the Commissioner of the General Land Office wished to reclassify; that it would reconvey certain lands for which it received patents which were claimed by the Government to be mineral and improperly patented as agricultural; and generally, that the company agreed to everything desired by the Commissioner of the General Land Office and Secretary of the Interior. One term of the agreement was that there should be a re-examination of approximately 33,854.55 acres, (N. Ex. 85, R. 740), which the Government Land Office claimed had been improperly classified non-mineral. The company was permitted to specify an equal, but not a greater, area which it claimed to have been improperly classified mineral. *The Government Land Office, through the Geological Survey, itself made the re-classification. The Company took no part in it.* Under this arrangement 67,776.26 acres were reclassified. 13,080.49 acres were classified mineral and 54,695.77 acres were classified non-mineral. Of the area claimed by the Government to have been erroneously classified non-mineral the United States Geological Survey re-classified 10,243.80 acres as mineral and 23,610.75 acres non-mineral. Of the area claimed by the company to have been erroneously classified mineral the United States Geological Survey re-classified 2,836.69 acres mineral and 31,085.02 acres non-mineral. Thus it appears the Government, by the re-classification, secured 13,080 acres and the company secured 54,695 acres. It is taken for granted, of course, that the Government selected for reclassification lands as to which it had the best case. In view of this it needs no stretch of the imagination to divine what would have been the result of an indiscriminate reclassification. Of course, the Northern Pacific, as Agent

Schwartz reported, would have obtained hundreds of thousands of acres of valuable timber lands which these commissioners wrongfully classified mineral without having been within miles of it. *Here is the reason why the Government is adamant in its refusal to reclassify.*

The agreement with the Secretary, as stated, was fully carried out by the company. The requirements of the General Land Office and Secretary were fully satisfied, and by letter of Secretary Ballinger dated February 14, 1911, to the Commissioner of the General Land Office, he advised that the agreement has been fully carried out by the company; that the purpose of the suspension of patents had been fully accomplished, and he recommended that the Land Office proceed to an adjudication of pending selection lists and resume issuance of patents of indemnity for losses under the mineral classification (N. P. Exhibit 84, R. 738). This was done accordingly. *From that day to the Joint Committee hearings and to the filing of this suit nothing was heard of the charge that the company debauched the commissioners and perpetrated a fraud in the classification.* There were some 35 of these commissioners. It is simply astounding that 35 Government officials, men of fair reputation in their lifetime, should be subjected to indiscriminate charges of fraud in the discharge of official duty after the lapse of more than 40 years and when all have long since passed to their rewards. The recklessness of these charges against Government officials is simply appalling.

Instead of acceding to the request contained in the Resolution of the Montana Legislature of March 4, 1909, Congress by Act of June 25, 1910, 36 Stat. 739, made an appropriation and authorized the Commissioner of General Land

Office to complete the classifications in the four land districts not finished by the boards under the Act of 1895.

The Master shows that, ever since this settlement, known as the "Garfield Agreement", patents have issued for indemnity lands in lieu of these mineral losses with the approval of the Secretary; that the United States has included in its forest reserves a large portion of the classified lands (2,894,823.43 acres), and has declared its intention to retain them; that it has taken possession of and dealt with the lands classified as mineral, disposed of some (65,155.47 acres) under the mineral laws and of some (455,040.03 acres) under general land laws; has received from sales of timber off place lands classified mineral considerable sums of money ($1,365,977) which it retains; that the company, for its part, has disposed of a large number, if not all, of the indemnity lands, (1,300,000 acres) and has left substantially 2,500,000 acres of mineral losses for which it has not been able to select indemnity, and which the Government now wishes to confiscate. The Master, in view of this state of facts, said:

> "I am of the opinion that on final hearing, nothing being shown to alter this effect, the recited facts would be a complete defense. I am not willing, however, to sustain the plea until a full investigation can be had of the charges." (First Report, R. 344).

That these charges have been resurrected from the grave after they had been fully considered and disposed of by a preceding generation will not appeal to a court of equity. It makes no difference if the United States is complainant. The general principles of equity are as applicable to a suit by the United States for cancellation and rescission, or

other equitable relief, as to an individual. *United States v. Stinson, supra; Dayton Airplane Co. v. United States,* 21 Fed. (2d) 673; *United States v. Denver & R. G. W. R. Co.,* 16 Fed. (2d) 374; *Reading Steel Casting Co. v. United States,* 268 U. S. 186; *Pettigrew v. United States,* 97 U. S. 385; *Fritch et al. v. United States,* 236 Fed. 133, 134; *Michigan v. Railroad Co.;* 152 U. S. 363, 368; *Jones v. United States,* 96 U. S. 24, 29; *United States v. Winona & St. Peter R. Co.,* 165 U. S. 463, 481, 482.

We submit there was never a case in which the principles of ratification, waiver and estoppel more forcibly apply than here. The charge of fraud is an afterthought. The Government never claimed the right to withdraw the indemnity lands because of the classification of 1895. *The base lands used in the Forest Reserve Case were mineral losses arising out of the classification of 1895.* The fact is too plain for denial that these charges are resurrected from the grave, to be used as a pretext for "saving" the Company's lands to the United States, as said by the Acting Forester, *supra,* p. 57.

4. CIRCUITOUS ROUTE IN WASHINGTON.

(Govt. Point 5, Brief, p. 116.)

We will discuss this subject under the following points:

(a) The approval of maps of location, acceptance of the complete railroad, and delivery of patents for contiguous lands, and other action estop the United States.

(b) The route was not unduly circuitous.

The Master, in his first report, well disposes of the Government's argument (R. 321). In the early eighties the chief concern was to secure a railroad that would connect Portland and Puget Sound with Lake Superior. The Joint Resolution of 1870 prescribed that the main line of railroad be located via the valley of the Columbia River to Puget Sound, "with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget Sound." Consequently, the company acted in compliance with the Joint Resolution when it filed a map of definite location and constructed the road between Spokane and Wallula on the Columbia River. In order to facilitate construction it was necessary that work be pushed eastward as well as to construct towards the west. Construction materials readily could be brought up the Columbia River as far as Wallula, and it was from that point that the work was pushed to the east while work was going on westward through Montana. When the line was completed into Wallula, it made a connection with

O. R. & N. railroad. That road was completed between Umatilla and Wallula in 1880 (I. C. C. Tentative Valuation Docket 329, p. 56). The contract between the Northern Pacific and the O. R. & N. of October 20, 1880 (N. P. Exhibit 71, R. 722) provided for the exchange of business at Wallula.

Counsel refer to *St. Paul & Pacific R. R. v. Northern Pacific R. R.*, 139 U. S. 1, as authority for saying that an unnecessarily circuitous route is not permissible. Of course, no one will say otherwise. In that case the St. Paul & Pacific had a grant under an Act passed in 1857, prior to that of the Northern Pacific, between St. Cloud and St. Vincent via Crow Wing, Minn. It did not locate or construct beyond Crow Wing, but did construct between St. Cloud and St. Vincent by an entirely different route under an Act of Congress passed in 1871. It sought to have the 1857 grant attach to the 1871 line in order to defeat the Northern Pacific grant. But the court said that to do this the line to have been followed, as compared with that actually constructed, would have deviated about 100 miles from a direct route between St. Cloud and St. Vincent and such deviation was held to be unauthorized under the 1857 act. It appears from page 16 of the opinion that the Secretary rejected the proposed route "because of its plain deviation from a direct line between the termini of the road authorized." The deviation in the St. Paul & Pacific case was 100 miles out of a total distance of 280 miles by the direct route. Nor was there any excuse or reason advanced for it. In the case at bar the deviation is about 90 miles in a distance of approximately 400 miles, and there is every reason in favor of the indirect route. In the St. Paul & Pacific case its only use was a device and pretext upon

which to try to win a lawsuit, but in the case at bar this route was shown from the beginning. The company actually built on that route; the road was examined by commissioners and accepted by the President. No complaint as to the route was ever raised until it was invoked in this lawsuit in an attempt to avoid the decision in the *Forest Reserve Case.*

The Secretary of the Interior knew what was going on. The annual report of the Auditor of Railroads for 1880 (p. 78) said that grading has been completed between Spokane and Ainsworth and, "Grading has also been done on a line to connect the road at Ainsworth with the O. R. & N. line at Wallula, a distance of about twelve miles." The report of Auditor of Railroads to the Secretary November 1, 1879, p. 22, shows that in July, 1879, he inspected the railroads in Washington Territory. The Auditor's report of November 1, 1880, p. 77, shows that the Pacific and Pend d'Oreille Divisions of the Northern Pacific were inspected in May, 1880.

Minority House Report 1256, 48th Congress (1884) (JCR 206) and the independent report of Congressman Brent (JCR 209), both are to the effect that no additional line should be built between Wallula and Portland. The minority report refers to the contract with the O. R. & N. and said:

> "We do not understand that the Northern Pacific is making any effort to construct their road to fill this gap. Indeed, there is no necessity for paralleling the line which they have leased."

Mr. Brent said:

> "The construction of the road between Wallula, Washington, and Portland, Oregon, is no longer re-

quired, and in all probability is not contemplated by the company for a long time to come. Another company, under the same general management, already has a road in operation over that portion of the line."

In the report of the Senate Committee on Public Lands, June 26, 1884, the statement is made:

"Every purpose of the Government is supplied in the construction of this section of 214 miles. There is no need for the construction of a parallel line to supply any demand of business either on the part of the Government or the general public."

The Secretary knew all the facts at the time he approved the maps of definite location for the branch line from Pasco to Tacoma. These maps were approved June 29, 1883, March 24, 1884, March 26, 1884, September 3, 1884, and December 8, 1884 (Government statement of land grants). The Government is urging that the railroad should not have been built between Pasco and Ellensburg. The Yakima Indian Reservation is and was located on the line between these two stations. On March 3, 1893 the United States required the Railroad Company to pay the Yakima Indians $8,295 for right of way through the reservation (27 Stat. 631). (Voucher showing payment is N. P. Exhibit 70, R. 721). Congress thereby ratified the location of the line. As stated by the Master, that action by Congress and the long course of dealing between the Government and the company over a period of half a century, estop the Government from now asserting that the railroad should have been built on a direct line between Lind and Ellensburg.

In *Union Pacific Railroad Co. v. United States*, 99 U. S. 402, the question was when the railroad was "completed"

so that interest on the subsidy bonds would begin to accrue. It was held that the road was completed as each 40 mile section was constructed, examined by commissioners and approved by the President even though there remained some additional work that the commissioners thought should be done. It was held that the company, having caused the examination and acceptance and having received the subsidy bonds due upon completion of the road, was estopped. The Government is no less estopped by its conduct here. We submit a clearer and stronger case of estoppel cannot be found.

The Master speaks of the direction that the railroad takes northerly through Missoula to Lake Pend d'Oreille, thence to the southwest through Spokane to Pasco, thence northwest up the Yakima Valley. He said that if the Court is invited to hold that the route is unauthorized between Lind and Ellensburg because not on the most direct line, equally it might be asked to say the same as to any other part of the route wherever it does not follow a direct line. The Act of 1864 and Joint Resolution of 1870 did not impose any such strait-jacket upon the Company. In *Van Wyck v. Knevals,* 106 U. S. 360, page 366, the Court said:

> "Until the map (of definite location) is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines."

The Master made this valuable comment:

> "This court knows judicially the principal topographical features of the country within its territorial jurisdiction, the general climate and soil condition and, of course, knows where the towns and communities are

situated. No averment can take out of the pleadings that knowledge, nor deny to the Judge the right to use it in determining the sufficiency of the pleading. I think your Honor knows judicially, as I am quite clear I know, that in the 70's or early 80's looking to an early and extensive development, the route up the Yakima Valley was the most eligible . . . . It is not necessary, but I feel constrained to add that the result of this choice has magnificently justified it to one who knew this section of the country in 1886 and knows it today."

The Court and Master rightly took judicial notice of the facts mentioned. *Arizona v. California,* 283 U. S. 423, 452.

The line of the Milwaukee is set up as the criterion of a direct line. The Milwaukee was constructed in 1906. At that time two other railroads served the Yakima Valley, the Union Pacific and Northern Pacific. The Milwaukee was not a pioneer line. It was built for the export and import business at Pacific Coast ports and for the lumber business in western Washington. So far as the country between Lind and Ellensburg is concerned, the Milwaukee railroad might as well be taken up. It is almost literally true that there is *no* business and no habitation between Ellensburg and Lind on the Milwaukee.

The Master's statement above quoted that the construction up the Yakima Valley has been "magnificently justified" is inadequate. In 1905 the United States Bureau of Reclamation adopted the Yakima project, consisting of six units. The Bureau of Reclamation has, since 1906, progressively increased the valley's irrigated acreage. The total acreage irrigated by Government projects in the Yakima Valley is 274,181 acres, constructed at a cost

of $26,166,271. In addition, private projects irrigate 140,000 acres. The total irrigated acreage in the Yakima Valley is 413,994. The Reclamation Bureau is now completing the Roza project. Work was begun January 8, 1936, estimated cost $15,000,000, The irrigated lands in the Yakima Valley produce about $50,000,000 worth of agricultural products per annum and support a population of approximately 110,000; whereas the total population of stations on the Milwaukee between Ellensburg and Lind is only 837. The Government's reclamation work in the Yakima Valley stands out beyond all comparison as the most successful in the United States. Carload business of the Northern Pacific in the valley in 1938 was 47,403 cars. The Union Pacific business is approximately 40% of the total business. Freight rail revenues in a normal year exceed $12,000,000. The Yakima Valley is the garden spot of the Pacific Northwest. It originates far more business than any other rural area of equal, or even nearly equal, size on the Northern Pacific. The Yakima River is the most valuable stream of its size in the United States.

INDIAN LANDS.

(Government Points 8 and 9, Brief 144 and 156)

This subject we will discuss under the following points:

(a) The described lands were Indian lands as to which the United States was obligated by Section 2 of the grant to extinguish the Indian title.

(b) The lands described in the treaties of 1851 (Fort Laramie) and 1855 (Blackfoot) were not excepted from the land grant to the Northern Pacific Railroad Company.

(c) The Indian right of occupancy, having been extinguished, a full fee simple title passed to the Railroad Company on definite location of the road.

(d) The Government is estopped by the impossibility of restoring the *status quo* and by the administrative construction of the Indian treaties from saying that the land was not lawfully patented to the company.

The plaintiff alleges that through mistake the officers of the United States have administered the lands embraced in the Treaties of September 17, 1851, and October 17, 1855 as if these lands were within the grant of July 2, 1864, as supplemented by the Resolution of May 31, 1870, whereas in truth these lands were, at the time of the grant, "reserved * * * or otherwise appropriated, and not free from * * * other claims and rights" so they never at any time fell within the grant. As a result of this alleged mistake the plaintiff claims that the Northern Pacific Railroad Company and the Northern Pacific Railway Company have received from the United States 13,300,000 acres to which neither company was entitled.

The claim can only be described as startling. The total area embraced within the Indian country described in the Fort Laramie treaty of 1851 is not less than 163,000,000 acres and within the Blackfoot treaty of 1855 is 37,000,000 acres more. If the plaintiff's claim is well founded more than 700 miles of the railroad running through this territory was built without aid of any land grant whatever. Yet no such contention has previously been made in more than half a century, and there has been patented to the railroad out of the area involved 12,000,000 acres of place lands and 1,300,000 of second indemnity lands. All these patents, as counsel for the Government now insist,

were made without any legal warrant whatever. The portentous scope of this belated contention is enough without more to cast discredit upon it.

It ascribes to Congress an intent to set aside by these treaties as a genuine reservation for the Indian tribes a major part of the area now comprising the states of North and South Dakota, Colorado, Nebraska, Montana, and Wyoming. The generosity of this provision is well illustrated in the case of the Crows, then some 3,000 in number. For these, according to the present theory, there were reserved under the Fort Laramie treaty 37,500,000 acres, or to each man, woman, and child in the Crow tribe 12,500 acres, or more than 18 square miles.

To reach this amazing conclusion counsel must, as we think, not only distort the language of the Act of 1864, but must overturn the firmly established departmental construction of the treaties themselves, and overrule if they cannot distinguish, applicable decisions of this and other courts.

The report of the Special Master (R. 349-364) and the opinion of the District Court (R. 410) discuss the subject with force and clarity.

We may notice, however, the various arguments which the plaintiff advances to support its present position.

Subdivision XXIX of the bill (R. 66) alleges that certain lands were reserved by the Fort Laramie Treaty of September 17, 1851 with the Sioux or Dahcotah, Cheyenne, Arrapaho, Crow, Assinaboin, Gros Ventre, Mandan, and Arrickara tribes and by the Treaty of October 17, 1855 with the Blackfoot Indians, but that, by "mistake" of the Government's officers, the grant has been administered as if the lands were subject thereto, and the com-

pany has received some 13,300,000 acres to which it is not entitled.

Both the demurrer and plea of estoppel were sustained and the subdivision dismissed. It is stated in appellant's brief (p. 145), though not in the complaint nor elsewhere of record, that the company has received upwards of 2,800,000 acres of land more than it could possibly have obtained under a correct administration. In consequence it is alleged that the company should not be awarded compensation in this proceeding for unsatisfied indemnity rights for the reason that "they have been satisfied in the other way".

By the last sentence of Section 2, in which section the right of way is granted, it is provided that

> "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

Section 3, making the grant of lands, reads in part as follows:

> "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' * * * every alternate section of public land * * * whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed."

(a) Appellant makes two contentions: first, that Sec. 2 throughout applies only to the right of way, not to the land grant; and, second, that by the two Indian treaties

the lands were reserved to the Indians and therefore excepted from the grant by Section 3.

The first contention was not presented below nor considered. The language employed in the act is explicit. The Indian title is to be extinguished not only as to the right of way but to "all lands falling under the operation of this act and acquired in the donation" etc. The point has been squarely decided against plaintiff's contention by this court at least twice: *Buttz v. Northern Pacific,* 119 U. S. 55, and *Atlantic & Pacific R. v. Mingus,* 165 U. S. 413. The *Buttz Case* was an action by the Railroad Company for possession of a tract of granted land in North Dakota. As the action was possessory, the company, of course, had to prevail on the strength of its own title under the Act of 1864. Defendant claimed under the pre-emption law. He alleged that the lands were not within the grant because the Indian title had not been extinguished prior to definite location of the road. The court held that the Indian title was only that of occupancy which the United States was obligated to extinguish. The court said:

> "At the time this act was passed, the land in controversy, and other lands covered by the grant, were in the occupation of the Sisseton and Wahpeton Bands of Dakota or Sioux Indians; and the second section provided that the United States should extinguish, as rapidly as might be consistent with public policy and the welfare of the Indians, their title to all lands 'falling under the operation of this act and acquired in the donation to the road.' * * *" (p. 58)
>
> "In the grant to the Railroad Company now before us Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might

be consistent with public policy and the welfare of the Indians.

"In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads, and telegraph lines across their lands, and to make such other improvements upon them as the interests of the government might require, and afterwards to obtain a cession of their entire title. * * *"

"with knowledge of their title and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extinguish the title."

Atlantic & Pacific v. Mingus, supra, is also directly in point. So far as advised, never before in the administration of the Northern Pacific, or any other railroad grant, has this contention been made. It is impossible to understand how the Government can make this contention in the face of the plain language of Section 2 and the decisions in the *Buttz* and *Mingus* Cases. The Indian title which the United States agreed to extinguish is "to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill." Certainly a right of way was not the only land donated. If the United States did not extinguish the Indian title to the lands, it might as well have made no grant, for, as said in the *Buttz Case* and by the Master, most of the lands through which the railroad would run were occupied by Indians in 1864.

(b) *Fort Laramie Treaty of 1851 (II Kappler 594).*

The treaty provides, Article I, that the eight tribes will refrain from hostilities against each other; Article II, that the United States may establish roads and military posts within their territories; Article III, in consideration of the preceding articles the United States agrees to protect the Indians against depredations by its citizens; Article IV, the Indians agree to make restitution for wrongs committed by them on citizens of the United States residing in or passing through their territories; Article V, "the aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:" (follows description of the respective territories of the several tribes); "It is, however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described"; Article VI, the Indians agree to sustain their chiefs during good behavior; Article VII, in consideration of the treaty stipulations, and the damages which have or may occur to the Indians and for their maintenance and improvement, the United States agrees to deliver $50,000 worth of goods per annum for ten years; Article VIII, if any of the Indians violate the treaty, the United States may withhold the annuities.

The treaty sets apart for the Blackfeet certain described territory, but that tribe did not reach the meeting place in

time. In 1855 a similar treaty was made with the Blackfeet which sets aside for them some of the lands described in the Fort Laramie Treaty as their territory. The Blackfoot treaty requires no special notice.

(c) The Master's discussion leaves little to be said. He said, however, that the *Buttz Case, supra,* does not aid to determine the effect of the Laramie Treaty because there was no similar Indian treaty covering the lands involved in that case on July 2, 1864 (R. 363). This was an inadvertence. Defendants did not assert that there was any treaty covering the lands on *July 2, 1864.* They said there was a treaty, in effect on date of *definite location* of the road. The Master momentarily forgot that lands reserved *at date of definite location* were excepted from the grant. 145 U. S. 535, 204 U. S. 190.

The precise question has been twice decided against the Government: *Buttz v. Northern Pacific R. Co.,* 119 U. S. 55; *Beecher v. Wetherby,* 95 U. S. 517.

The *Buttz Case* was an action by the company for possession of a tract of land in North Dakota, against one Peronto, a pre-emptor, to whose rights Buttz succeeded. On July 2, 1864 the land was occupied by the Sioux Indians. The map of general route was filed February 21, 1872 and definite location, May 26, 1873. On February 19, 1867, prior to filing of both maps, a treaty was concluded between the United States and Sisseton and Wahpeton Indians. If the treaty reserved the lands to the Indians, the company could not recover.

The Sisseton-Wahpeton treaty (II Kappler 956, 15 Stat. 505) recites that, whereas these bands had periled their lives during the outbreak of other Sioux bands to rescue white women and children, and that another portion of

said bands, who did not participate in the massacre, had fled to the west to escape indiscriminate vengeance of the whites; and whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the friendly portion of the bands and they had been made homeless wanderers although at all times prompt to repel raids and punish depredations by hostile Indians; and whereas the friendly Indians ask that their conduct be recognized and provision made for them to return to agricultural life; therefore, the following treaty is made: Article 1, the Indians agree to continue friendly relations and use their influence to prevent other bands from committing hostilities; Article 2, the Indians cede to the United States the right to construct wagon roads, telegraph lines and other public improvements "over and across the lands claimed by said bands (including their reservation as hereinafter designated) over any route or routes that may be selected by authority of the Government, said lands so claimed being bounded", etc.; Article 3, in consideration of the cession above mentioned, and of the faithful and important service rendered by the friendly bands, and in consideration of the (mistaken) confiscation of their annuities, reservations and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered and for the members of the bands released from prison in 1866, the following described lands as a permanent reservation, viz. (description of lands in the permanent reservation); Article 4, a reservation is created for other bands; Articles 5 to 10 provide for apportionment of 160 acre tracts, schools, etc. on the permanent reservations.

It would be worth while for the court to have before it N. P. Exhibit 100 showing the land in controversy in the

Buttz Case. It was located near Fargo within the boundaries of the tract "claimed" by the Indians and described in Article 2 of the treaty. That tract had precisely the same status as the lands claimed by the Indians and defined by the Treaty of Fort Laramie (Govt. Ex. 65) as Crow Territory, Sioux or Dacotah Territory, etc. The 1867 treaty with the Sisseton and Wahpeton bands, in Article 2, gives to the United States rights like those given in the Laramie Treaty, and the lands are similarly described as "lands claimed" by the Indians. Certainly, the Fort Laramie Treaty does no more toward recognizing Indian title or establishing an Indian reservation than the treaty of 1867, so far as the lands in controversy in the *Buttz Case* are concerned, which were outside the technical reservations established by that treaty.

The court held that the Indian title to the lands claimed by the Indians was that of *occupancy only,* and did not except the lands from the grant by Section 3. On the contrary, the court said they were lands as to which Congress was obligated to extinguish the Indian title under Section 2.

The court said:

> "The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold, or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed a large, if not the greater, portion of the lands along the entire route to Puget Sound on which the road of the company was to be constructed, was subject to this right of occupancy by the Indians.

With knowledge of their title and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the act. The only limitation upon the action of the United States was that imposed by the act of Congress, that they would extinguish the title as rapidly as might be 'consistent with public policy and the welfare of said Indians.' Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy." (pp. 70, 71)

The *Buttz Case* has been cited with approval in the following cases:

Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 542.

M. K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 117.

Atlantic & Pacific R. R. Co. v. Mingus, 165 U. S. 413, 415.

Minnesota v. Hitchcock, 185 U. S. 373, 399.

Clairmont v. United States, 225 U. S. 551, 556.

Cramer v. United States, 261 U. S. 219, 230.

To the same effect is the decision in *Beecher v. Wetherby*, 95 U. S. 516 (1877).

The Wisconsin enabling act of August 6, 1846 reserves for the state Section 16 in every township, as follows:

> "section numbered 16 in every township of the public lands in said State, *and when such section has been sold or otherwise disposed of,* other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools." (Italics supplied).

There was in effect a treaty dated August 19, 1825 (II Kappler 250, 7 Stat. 272) between the United States and various Indian tribes. The preamble recites that there had been wars between the tribes and in order to promote peace by fixing boundaries between them, the tribes have been assembled and have agreed with the United States and with one another upon the following articles: Article 1, that there shall be peace between the tribes; Article 2, that the boundaries between the Sacs, Fox and Sioux shall be as follows (describing the boundaries); Articles 3 to 9 inclusive similarly define boundaries between various other tribes; Article 10, the tribes acknowledge the control of the United States, and the United States agrees to recognize the boundaries described; Articles 11 and 12 provide for convening councils to effect an amicable and final adjustment of the boundaries left unsettled by the treaty; Article 13 provides that the tribes shall not hunt within the acknowledged limits of any other tribe.

The *Beecher Case* was a contest between parties claiming under a patent from Wisconsin and parties claiming under a later patent from the United States. It was contended by the patentee of the United States that the treaty excepted the land from the enabling act as being lands "sold or otherwise disposed of." The court said:

"It is true that, for many years before Wisconsin became a State, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands *claimed by different tribes of Indians as between themselves,* and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. *But the right which the Indians held was only that of occupancy.* The fee was in the United States, subject to that right, and *could be transferred by them whenever* they chose." (p. 525)

The *Buttz Case* was decided November 15, 1886, and the *Wetherby Case* some time prior. With those decisions before it Congress passed the Act of March 3, 1887, which provides:

"That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, *in accordance with the decisions of the Supreme Court,* each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted." (Italics supplied)

The Government's argument would suggest that the Fort Laramie treaty was *sui generis.* But it is like innumerable treaties of "peace and friendship" with the Indians, such as those considered in the *Buttz* and *Beecher Cases.* As early as 1825 the United States made treaties of friendship with each of the tribes who afterwards were parties to the

Fort Laramie Treaty, the Arickarees, Minnetarees (Gros Ventre), Mandans, Crows, Sioux and Cheyennes, by which they agreed not to molest traders and others legally "within the limits of their particular district of country" (7 Stat. Indian Treaties, 250, 255, 259, 261, 264, 266). It would be just as reasonable to say that those treaties excepted lands from the grant. There is no difference between the Fort Laramie Treaty of 1851 and the Blackfoot Treaty of 1855 and these earlier treaties, except that the later treaties described in writing the boundaries to which the Indians agreed among themselves and showed them on a map. The United States was concerned in keeping peace among the Indians, and it was for that purpose only that it was concerned with their boundaries, as stated in the treaty in the *Wetherby Case*. Nothing was of less consequence to the United States than the bounds of the territory certain tribes of Indians were occupying, providing they agreed among themselves to respect each other's limits and remained at peace with each other and with the citizens of the United States. Innumerable treaties like the Laramie will be found in Kappler's Indian Affairs, Laws and Treaties, Vol. II.

In contrast with such treaties are those which were made in 1867 and 1868 with the western tribes, of which that with the Crows of May 17, 1868 (15 Stat. 649), is typical. By that treaty the Crows accepted a reduced reservation for their absolute and undisturbed use and occupation, and the United States solemnly agreed that no others except its officers and employes shall ever be permitted to pass over or reside in the reservation. The treaty provides for construction of warehouses, agency building, residence for physician, farmer, carpenter, blacksmith, mil-

ler, engineer, and for a school house. The Indians agree that they will make the reservation their permanent home. There are detailed provisions as to the duties of the agent, selection of lands for farming by the Indians, for a teacher, attendance at school of Indian children, for seeds, agricultural implements, instruction in farming; and, finally, for delivery of clothing and stock to the Indians. Other treaties of this kind are those with the Shoshones of July 3, 1868 (15 Stat. 673), discussed in *United States v. Shoshone,* 304 U. S. 111; with the Northern Cheyenne and Northern Arapaho of May 10, 1868; with the Navaho, June 1, 1868. Similar treaties with many other tribes will be found in 15 Stat. 667. By the Act of March 3, 1871 (16 Stat. 544), it was provided that thereafter the Indians should be subject to acts of Congress and the practice of making treaties was discontinued.

The Government cites but apparently does not attach much importance to the decision of the Court of Claims in *Indians of the Fort Berthold Reservation v. United States,* 71 Ct. Cls. 308, and *Blackfeet Indians v. United States,* 81 Ct. Cls. 101. The Master's observations on the cases leave nothing to be said. Obviously, those cases do not hold or even intimate that the Fort Laramie lands were "reserved" within the meaning of Section 3. On the contrary, the findings and decision recognize that the lands were subject to the obligation of Section 2 to extinguish the Indian title. (Findings 10, 11, 12, 13 and 14 of the *Fort Berthold Case.*) The court quotes from Commissioner Mitchell's report upon the Laramie Treaty to the effect that its purpose was "by delimiting the territory, to take away the cause of quarrels among the Indians and at the same time enable the Government to ascertain who are the depredators should

depredations afterwards be committed". The court sai
that the cause of Indian wars, which had excluded th
whites from the country, arose in large part out of di
putes as to tribal territory, and that the treaty assured t
the Indians that the territory described was held by the
"as Indian country was held by Indians". "The quantit
of lands involved," said the court, "was not a serious fa
tor; the perplexing question was the division of the d
main among the tribes in such a way as to insure trib
peace."

The *Fort Berthold Case* does not even suggest that th
Laramie treaty lands were reserved from the Norther
Pacific grant. The only effect of the treaty was to identif
the lands occupied by the respective tribes. The obligatio
which the Government has always voluntarily assumed t
compensate the Indians for their right of occupancy woul
have been exactly the same if there had been no Larami
treaty. Its only importance was to *identify the land*
occupied by the several tribes, and this is the only effec
which the court gave, or needed to give, it. Had not th
lands been there described the Indians could have an
would have had to resort to other evidence to prove th
limits of their tribal territory. They have made such proo
in cases where their tribal country was not defined b
treaty.

The Government cites also such cases as *United State*
v. Northern Pacific R., 227 U. S. 355; *Northern Pacific Ry*
v. Wismer, 246 U. S. 283; *Atlantic & Pacific R. Co. v. Mi*
gus, 165 U. S. 413; and *Northern Pacific R. Co. v. Hinch*
man, 53 Fed. 523. The first case cited deals with the locu
tion of the western boundary of the Yakima Indian Rese
vation created by the treaty of 1855 (12 Stat. 951). Thi

treaty created a technical reservation, provided for exclusive occupancy and established schools, shops, sawmills and hospital, etc. The second case deals with the same character of treaty. The *Mingus Case* deals with a treaty establishing the Indian Territory which the court said "made those Indians practically an independent nation", and besides, deals with a provision for extinguishing Indian titles materially different from that of Section 2 of the Northern Pacific granting act. The last case deals with the Flathead Treaty (12 Stat. 975), establishing a technical reservation for the exclusive use of the Indians. The *Shoshone Case* has already been mentioned. However, the Government in discussing that case, claims that the court was referring to a tract of 44,672,000 acres theretofore recognized as Shoshone territory. This is a mistake. The court was discussing the reduced technical reservation amounting to only 3,054,182 acres. It was for the invasion of the reduced technical reservation that compensation was awarded the Shoshones.

Cramer v. U. S., 261 U. S. 219, cited by appellant, was a suit by the Government in behalf of three Indians to cancel a patent issued to Central Pacific Railway Company, successor to the grant made by the Act of July 25, 1866, 14 Stat. 239. The findings were that the three Indians lived with their parents as non-tribal Indians as early as 1859 upon the land and continuously ever since; that between 150 and 175 acres in an irregular tract were fenced; that some of the land was irrigated and cultivated; and that dwelling houses and out buildings were erected and the purpose was to make homes. An Indian could not acquire title to public land prior to the Act of March 3, 1875 that gave the homestead privilege to Indians.

The court says (p. 227) that individual Indian occupancy is in harmony with the Government's policy of inducing the Indian to adopt habits of civilized life and that protection of individual occupancy finds support in instructions issued by the Interior Department to local officers and in rulings of the Department, Land Decisions being cited in which individual Indian occupancy was upheld. The court held that the claim was based on occupancy and cultivation and awarded title only to that part of the land that had been fenced.

The Fort Laramie Treaty refers to "Indian country" and "Indian territory". In the *Fort Berthold Case* the court refers to the territory as an Indian reservation. This is a loose but not uncommon use of the word, "reservation". Thus in United States v. Celestine, 215 U. S. 278 at p. 285, the opinion describes as a "reservation" all of the land west of the Mississippi described in the act of June 30, 1834 defining Indian "country".

It really is of no particular consequence what are the nature of the Indian rights by the Fort Laramie Treaty. Congress had the power to grant the lands to the company and extinguish their title whatever it was. *Buttz v. Northern Pacific* and *Beecher v. Wetherby, supra.*

The Master, after considering Sections 2 and 3 of the grant and the Buttz decision, said:

> "In this view the arguments of counsel as to whether these treaties created reservations for the Indian tribes, or quasi-reservations, or whether they were treaties of peace and amity only, and as an essential or convenient particular thereof, a recognition of their ancestral occupancy of the designated division of the public domain, are not of great importance. Whatever the technical effect of the terms employed, looked

> at in the abstract, it seems clear that it was not intended to limit the power of the United States to dispose of these lands, and to provide permanent reservations for the Indians whenever in the course of events it should seem best for both them and intending settlers to make such provision. To me, at least, it is clear that the language of section 2 declares that power and policy for the purposes of the grant. Congress seems to have taken the same view." (R. 353).

It is certain that Congress did take that view, for by various treaties, it did afterwards provide permanent reservations for the Fort Laramie Indians, as appears from the treaties of 1867 and 1868 above cited. The Assiniboin, who are not mentioned in those treaties, ceded their country in 1866 and accepted a home on the reservation of the Blackfeet, established April 15, 1874, as stated in Part II of the 18th Annual Report of the Bureau of Ethnology, p. 787. The abandonment, of course, extinguished the Indian title, as held in the *Buttz* and other cases. Thereby, the Northern Pacific obtained title to the Assiniboin territory under its map of definite location in 1881. By the treaty of 1868, *supra,* the Sioux relinquished all of that portion of the Fort Laramie lands south of the Heart River, and by executive order of March 16, 1875 the President set apart for the Sioux some of the lands that had been ceded by the treaty of April 29, 1868. This disposes of all of the lands covered by the Fort Laramie Treaty of 1851 except the territory for which the Government compensated the Indians as a result of the *Fort Berthold Case.* Of course, it was no concern of the Railway Company how, when or where the Government compensated the Indians, provided that the company received the granted lands. If

the Government thought proper, it might compensate the Indians before conveying the lands to the company, but if it conveyed the lands before doing so, it still had the obligation to do justice to the Indians. It did this in the *Fort Berthold* and *Blackfoot Cases,* but this was no concern of the company. As held in the *Buttz Case,* it was not necessary to extinguish the Indian title before the company acquired the lands by maps of definite location. It might, as it did as to some of the lands, convey them to the company and afterwards do belated justice to the Indians.

(d) *The Government is estopped by the impossibility of restoring the status quo and the administrative construction of the Indian treaties from saying that the land was not lawfully patented to the company.*

The grant was construed and administered from the beginning to the commencement of this controversy on the assumption that the Indian treaties did not except the lands from the grant. 13,300,000 acres were, accordingly, patented to the company. The patents were never questioned until the Forester in an attempt to "save" the company lands to the United States, raised the question by the 16th point of his objections to the tentative adjustment of December 31, 1921 in his letter of January 12, 1924, as follows (JCR 26):

> "16. To reconsider whether Crow Indian Reservation losses could be satisfied in the second indemnity belt . . . . 1,300,000" acres.

The argument was that the Fort Laramie Treaty excepted the Crow lands from the grant, and, as the loss occurred prior to July 2, 1864, it could not be used in second indemnity limits. The effort then was to deprive the company of only 1,300,000 acres. Later (JCR 5500-5502) logic forced the Government to say that the 13,300,000 acres were excepted by the Laramie treaty and were, therefore, prior losses. The enormity of such a contention has annoyed Government counsel ever since. But the Forester, of course, is not charged with the administration of the grant. His contentions are of no more weight than those of any other stranger. The Commissioner of the General Land Office denied the Forester's contention and adhered to the long established construction of the Laramie Treaty. In the letter of March 5, 1925 from Commissioner Spry to the Secretary of the Interior, considering each of the Forester's points, he said with reference to point 16 (JCR 378):

> "'16. To reconsider whether Crow Indian Reservation losses could be satisfied in the second indemnity belt.'
>
> "This contention is based upon the so-called Fort Laramie treaty of September 17, 1851, which was never formally ratified by Congress. Under this treaty it would appear that no technical reservations were sought to be established, the treaty being intended merely to separate by natural boundaries, for the use of certain Indian tribes, what was, strictly speaking, Indian country. This treaty did not provide for any cession of land to the United States. *The land embraced therein was 'Indian country', such as under section 2 of the act of July 2, 1864, the United States agreed to extinguish the Indian title in order that the company might acquire the land under its grant.* By treaty of May 7, 1868 (15 Stat. 649), a technical reser-

vation was created for the Crows, being a portion of the land occupied by them and included within the limits defined in the proposed treaty of 1851."

The Commissioner said more in this sense and commented upon the enormity of the loss to the grant if all the Fort Laramie lands be considered as having been excepted by the treaty of 1851.

The Secretary of the Interior, in his letter of March 25, 1925 to Hon. N. J. Sinnott, Chairman of the Joint Committee of Congress, transmitting Commissioner Spry's report to him, did not disagree.

In *Northern Pacific R. Co. v. Clark,* 5 L. D. 138, (September 8, 1886), the question was whether the grant attached to certain lands embraced within the Crow Reservation established by the treaty of *1868* and later released to the United States under an agreement with the Crows, dated April 11, 1882. The decision was negative, and of course, is correct. Speaking of the condition of the Crow territory at date of the act of July 2, 1864, Acting Secretary Muldrow said:

> "The territory then occupied by the Crows extended over a vast range of country, from the northern boundary of New Mexico to the Missouri River in northern Montana. It had no fixed boundaries, and was not recognized strictly as a reservation, but simply as the territory of the Crows. *This was the condition of their territory when the grant to the Northern Pacific road was made; and at that time no treaty had been made with said Indians guaranteeing to them a positive reservation for their exclusive use and occupation.*
>
> "In 1868, four years after the grant to this road, a treaty was entered into between the United States and the Crow tribe of Indians, by which a tract of land

(describing the boundaries) was set apart for the absolute and undisturbed use and occupation of said Indians, and by said treaty the Crows relinquished all tile, claims or rights to any portion of the territory of the United States, except what was embraced within the defined limits of such reservation." (p. 139. Italics supplied).

This decision was strictly in accord with the decision of this court in *Beecher v. Wetherby* and *Buttz v. Northern Pacific, supra,* the latter decided two months afterward. It hardly needed the Act of Congress of March 3, 1887, *supra,* directing the adjustment of the grant "in accordance with the decisions of the Supreme Court" to secure the company against the preposterous claim now asserted.

The Master (R. 355) in discussing the Fort Laramie Treaty, said:

"The time was at hand when the western flood of migration could no longer be held back. And so the time had arrived when public policy and the welfare of the Indians required the extinguishment of their title, not only or principally that the grant to the railroad company might attach as provided by section 2, but what was perhaps more important, *that the settlement and development of the vast area might proceed.* To that end the Indian right of occupancy was terminated and the bands retired to reservation. * * * It is sufficient to say, additionally, only that the Indians' title was extinguished, and the way made clear to build the Northern Pacific road, and for its grant to attach in advance of actual construction, with the exception of certain reservations thus established, as that of the Crows, by treaty of May 7, 1868.

"Thereupon the grant was administered from the beginning upon the theory that the treaties under consideration in this subdivision, did not except the lands

from the grant but that permanent reservations created before definite location did. Thus, through the Crow reservation of May 7, 1868, the Company was required to pay the Indians for its right of way, and, as in that reservation the place lands were lost to the grant, it was permitted to make lieu selections in indemnity limits. Had the grant been administered as the Government now says it should have been, the greater part, if not all of the indemnity lands would have been at once exhausted; leaving little or nothing to supply the ordinary losses which, only, as I think, they were intended to cover. It is not now possible, if this administration of the grant be held erroneous, to restore the situation as it was at dates of definite locations. Of necessity much of the indemnity land must have gone to actual settlers or have been otherwise disposed of so that it is no longer available for selection. To now overthrow the ruling of the land department uniform for a half century would result in an overwhelming loss to the company of lands which it had fairly earned under its grant, in place of which no other lands are available and for which it is called upon to make money reparation in a huge sum—a situation resulting from the action of the Government itself—action unquestioned by any department of the Government for more than fifty years." (Italics supplied)

Concluding his discussion, the Master said (R. 364):

"I hold, also, that the plea of estoppel, in the sense I have heretofore explained it, should be sustained. The administration of the grant for 50 years, the acquiescence of Congress, of the Executive and of the Legal Department in that administration and the impossibility now of restoring the grant to its original situation and the consequent injustice that would otherwise result, seems to me to demand such holding."

The Master inadequately stated the consequence of sustaining the Government's contention. If the Laramie treaty lands were excepted from the grant, there would have been a deficiency in the first indemnity limits of the entire grant at dates of definite location between 1880 and 1884, even had there been no losses to settlers, etc. Thus, Gov. Ex. 106 Rev. shows that on the several dates of definite location in North Dakota and Montana between 1880 and 1884 (the variation from year to year is negligible) there were in the first indemnity limits of the entire grant 7,773,983 acres, including both surveyed and unsurveyed land, plus 358,200 acres in the mineral indemnity belt of Wisconsin and Minnesota, a total of 8,132,183 acres. The deficiency on account of the treaty losses alone would be 5,167,817 acres. Said exhibit also shows that there were between 1880 and 1884 losses of 2,929,803 acres, which, added to the above stated deficiency, makes a total deficiency of 8,097,620 acres. After the mineral classification of 1895 there were additional mineral losses in place limits of 3,834,958 acres, so that by 1900 the deficiency would have been 11,932,578. And still we have not made allowance for additional indemnity lands lost to settlers or unsurveyed lands and there is also to be added 736,512 acres of indemnity lands classified mineral after 1895. So, if the Government is right, the grant was deficient at date of definite locations by more than 5,000,000 acres and the deficiency progressively increased until it reached 11,932,000 acres. It takes no argument to prove that under these circumstances the Act of July 2, 1864 might just as well have never been passed.

As bearing on the administration of the grant and the impossibility of restoring the status quo, it is settled that every acre in the first indemnity limits would have belonged

to the company without the need of selection under the decisions in *St. Paul & Pacific v. Northern Pacific,* 139 U. S. 1, and the *Forest Reserve Case,* 256 U. S. 51. Obviously, the necessity for second indemnity limits, which was recognized and provided for in the Joint Resolution, would have been apparent at the date of the Act of July 2, 1864. It may be said without fear of contradiction that instead of a ten mile indemnity belt having been provided in 1864, and a second ten mile belt in 1870, Congress would have had to provide at least a 30 mile limit in the first instance. No doubt it would have done so. It was then urgently concerned with construction of the railroad. Of course, a second indemnity belt would have been needed in North Dakota and Montana and would have been laid down immediately after the passage of the Joint Resolution of 1870. The company would have received those second indemnity lands at least and will have been deprived of that right if the Government's contention be now sustained.

If the Government's present claim is sound, the company would have been stripped of any grant for the road between the Missouri River at Bismarck and the town of Blossburg, Montana, west of Helena, a distance of 705 miles. The enormity of the Government's contention is illustrated by the map (Gov. Ex. 65), showing the area covered by the Laramie Treaty. On N. P. Ex. 101 (R. 748), map of the United States, are outlined the limits of the Fort Laramie Treaty. In addition to the loss of 13,300,000 acres to the Northern Pacific, the Union Pacific and Kansas Pacific would have sustained a loss, at the rate of only 20 sections per mile, of approximately 9,000,000 acres (R. 765). The Government has never yet challenged the title of the Union Pacific and Kansas Pacific, though no less vulnerable to

this contention. The Northern Pacific line, at least, certainly could not have been constructed if it had been deprived of these 13,300,000 acres even if it could have obtained indemnity after 1880 from the remote lands of little or no value lying more than fifty miles from the road. The District Court, affirming the Master, said (R. 410):

> "To illustrate how ridiculous it would be to hold that these treaties exempted the lands covered by them from the grant to the railway company let us note briefly the situation as to the Crow Territory alone. Under the Fort Laramie Treaty the acreage in the Crow Territory was 37,500,000 acres and there were approximately 3,000 Crow Indians in 1851. This means that 12,500 acres or more than eighteen square miles, were 'reserved' for each man, woman and child in the Crow tribe. If there had been a reservation of these lands so that they did not pass under the grant of 1864, the railway company would have been compelled to build more than 700 miles of railroad without the aid of the grant except to the limited and comparatively inconsequential extent that it might be able to secure indemnity. Since the purpose of the Act of 1864 was to aid and encourage the construction of a transcontinental railroad from Lake Superior to Puget Sound it would hardly do to hold that Congress in that very act so contrived as to make the construction of such a railroad impossible. It requires no argument to demonstrate that if these lands had been reserved the road could not have been constructed. I am convinced that it was never the thought or purpose of the Congress that the lands involved in these treaties were to be excepted from the grant to the railway company, no matter what effect that may have had in conferring some rights upon the tribes involved."

The truth of the court's remarks is demonstrated by the fact that the company could not even build about 150 miles from Portland to Tacoma without the aid of a grant of lands, to say nothing of 700 miles. The resolution of 1869 was ineffectual because no grant was made. This was followed by the Resolution of 1870 making the necessary grant. There is no doubt that Congress intended to make a grant of lands or give indemnity for every mile of line. This is apparent from the two grants, and, if more be needed, see the debates in Congress concerning the 1870 resolution, copied in the Land Department's decision in the *McRae Case,* quoted at p. 38-40 of appellants' brief in No. 477.

The patents already issued for these lands cannot be set aside as more than six years have elapsed (Act of March 2, 1896, 29 Stat. 42). No damages are claimed for fraud as no fraud is alleged. It is merely stated that the land officers made a "mistake", a mistake the Forester pretends to have discovered after the lapse of fifty years during which the company, under the settled rules of the Department of the Interior, followed by Secretary after Secretary, has been receiving patents, mortgaging millions of acres, selling other millions to bona fide purchasers and paying out large sums of money for taxes, administration and care of the lands. We hardly need to cite cases that this administrative construction, settled for more than half a century, will not be reversed. *Hewitt v. Schultz,* 180 U. S. 139, 156; *Cramer v. United States,* 261 U. S. 219, 227; *Kindred v. Union Pacific R. R. Co.,* 225 U. S. 582, 596; *Southern Pacific v. United States,* 307 U. S. 393. Nor is authority needed to prove that the Master and District Court were right in sustaining the plea of estoppel under well established principles, no less binding on the United States than others.

United States v. Stinson, 197 U. S. 200; *Dayton Airplane Co. v. United States,* 21 Fed. (2d) 673; *United States v. D. & R. G. W. R. Co.,* 16 Fed. (2d) 374; *Reading Steel Casting Co. v. United States,* 268 U. S. 186; *United States v. Detroit Lumber Co.,* 200 U. S. 321, 339.

6. PRE-EMPTION PROVISO OF JOINT RESOLUTION OF 1870.

(Govt. Point 14, Brief, p. 183)

This subject we discuss under the following points:

(a) The pre-emption proviso never took effect as the lands have been at all times subject to mortgage, p. 122.

(b) The proviso does not apply to the Railway Company which purchased the lands at the foreclosure sale in 1896, p. 123.

(c) The proviso imposed no duty of affirmative action on the company, p. 124.

(d) The proviso does not apply to the 1864 grant, p. 126.

(e) The Act of 1864 forbade only mortgage of the railroad.

Subdivision XXXII of the complaint relates to alleged unauthorized withdrawals. No relief is asked, nor was the Government injured or the company benefited. The Master in his first report (R. 368-9) has said all that this subject requires.

Subdivision XIII charges that the railroad company did not open any or all lands to settlement and pre-emption at $2.50 per acre. This is said to be a breach of the first proviso of the Joint Resolution of May 31, 1870. The proviso is as follows:

> *"Provided,* That all lands hereby granted to said Company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands at a price to be paid to said Company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said Company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

(a) Subdivision XIII is controlled by *Platt v. Union Pacific,* 99 U. S. 48, where this court construed a proviso in the Union Pacific grant identical with the above. Section 3 of the Act of July 1, 1862 makes a grant to the Union Pacific, and provides:

> "And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre to be paid to said company."

Platt filed a bill to enjoin the Union Pacific from prosecuting against him an action of ejectment. He alleged that he had settled on the land in 1874, filed his declaratory statement, and paid the Government price. Three questions

were decided: (a) Whether the words "disposed of by the company" include a mortgage; (b) whether the mortgage was superior to the pre-emption privilege extended to settlers; (c) the nature of the obligation imposed on the company by the pre-emption provision. This court held that the words, "disposed of", included a mortgage. The court said:

> "specially is this so when, as in the present case, the lands have been granted to the company by the legislature that granted the charter, without any restriction of their use."

(It is admitted that our lands were covered by mortgage five years after completion of the railroad.)

The court held also that the mortgage was superior to the pre-emption right. The court said:

> "If, therefore, a mortgage could only bind the lands unsold until the expiration of three years after that date, it would have been an hypothecation of a term of years, and as to some of the lands, for a term of only three years. Was that the aid proffered by Congress to stimulate and render possible the completion of an enterprise in which it felt so deep an interest? If so, it was a barren gift. * * * The power of disposition given for the express purpose of enabling the company to raise money for the construction of the road, by such an interpretation of the act, is made of no value. The interpretation, therefore, defeats the manifest intention of Congress, and for that reason it cannot be accepted." (p. 62)

(b) The mortgages foreclosed in 1896 were issued long prior to completion of the road. The property passed to the Northern Pacific Railway Company by the foreclosure

sales. Since that date the pre-emption proviso could not possibly be operative even if before it had been. As above shown, these mortgages were valid, and the decree so adjudges (R. 640). The Government has recognized the title of the Railway Company, and the question is *res adjudicata* by repeated decisions of this court, see *supra,* p. 20 et seq.

(c) But if the *Platt case* decided nothing else, it is conclusive on point (c), namely, that the proviso merely gave settlers a right of pre-emption. It imposed no obligation whatsoever upon the company. The court said:

> "The provision that at the expiration of three years from the completion of the road the unsold or undisposed-of lands should be open to pre-emption, was in its nature, not one to be 'strictly and faithfully carried out and fulfilled' by the company. The right to pre-emption of whatever might be left for pre-emption was a matter with which the company had nothing to do,—in relation to which they had no duties to perform, and only a right to the price paid by the pre-emptor." (p. 63)

It is not even claimed that the company interfered with the right of pre-emption, if any there was. The company certainly was under no obligation to pay taxes on the lands and preserve them until a settler saw fit to file a pre-emption.

The decision in *Railway v. McShane,* 24 Fed. Cases 640 (affirmed in this court, 22 Wall. 444), holds that the pre-emption right "does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them."

The decision of the Land Department in *Heath v. Northern Pacific Railway Company,* 38 L. D. 77, decided July 17, 1909, settled the departmental construction of the proviso. There, one Heath made a homestead application on lands within the 1870 grant. He claimed that more than five years had elapsed after the completion of the road, and the company was holding the lands in violation of the 1870 resolution. He attacked the 1875 reorganization and the Secretary discussed it. He held that whatever might be the effect of those proceedings, the fact was that by the foreclosure of 1896 the lands had been sold in the manner provided by the Joint Resolution. The Secretary observed that the pre-emption law in effect at the date of the grant had been repealed by the Act of March 3, 1891 (26 Stat. 1097). The Secretary concluded as follows:

> "From what has been stated, the department is clearly of the opinion that it should not attempt to issue regulations providing for the entry under any of the public-land laws of lands which have been earned by the railway company, and your office decision is accordingly affirmed." (p. 84)

No appeal was taken from this decision, and the question was not reopened until this case was filed.

The Government cites, though it does not rely on, *O. & C. v. United States,* 238 U. S. 393, where the court construed a very different proviso. The Act of April 10, 1869 granting lands to the Oregon & California Railroad provided that:

> "And provided further, That the lands granted by the act aforesaid *shall be sold to actual settlers only,* in quantities not greater than one quarter section to

one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

This language was held to be a continuing covenant and a law. There could hardly be a more significant difference between this proviso and the one in the Northern Pacific and Union Pacific grants. As a matter of fact, the legislative history, to which the Master refers, shows that an identical proviso was proposed for the Joint Resolution of 1870 and rejected. The debates conclusively establish that Congress considered and rejected the covenant requiring sales to actual settlers at $2.50 per acre, and that it deliberately refused to make the mortgages subordinate to the rights of settlers. The curious may consult these debates if desired. The Senate debates will be found in the Congressional Globe, 41st Congress, Second Session, 1870, at pp. 1097, 1477, 1584, 1624, 2480, 2539, 2569, 2833, 2867. In the House the debates appear at pp. 3263, 3365. These debates were before the Master and referred to by him. They were properly considered. *United States v. St. P. M. & M. Ry. Co.*, 247 U. S. 310.

(d) It was insisted below, though not in this court, that the proviso applied as well to the 1864 grant as to the 1870 grant. Of course there is not the slightest basis for this position. The proviso is that "all lands *hereby* granted to said Company." (Italics supplied.) Of course, this refers only to place lands granted by the Joint Resolution. The resolution was a separate and independent act. This was the Master's view. *Hewitt v. Schultz*, 180 U. S. 139; *Northern Pacific Ry. Co. v. DeLacey*, 174 U. S. 622; *United States v. Northern Pacific Ry. Co.*, 193 U. S. 1.

Below, the Government urged this question as having a bearing upon the so-called clean-hands doctrine. In this court it has abandoned that position. It is said that the Government should have an accounting, and a judgment for $200,000,000, which it pretends is the unmerited enrichment which the company received by not complying with the proviso. If this claim is seriously put forward, we observe that the amount is more than twice as much as the net amount of receipts from sales of granted lands, *supra*, p. —. Confining the proviso to the 1870 grant, as it must be, it appears from Finding II—Grant of 1870, (R. 613), that, deducting the Tacoma Overlap area, the measure of the grant was only 2,189,857.71 acres, of which the company has received only 1,601,338.82 acres. The present astounding claim was not made below.

(e) The Government, in its argument, assumes that the company derived its right to mortgage the *land grant* from the Joint Resolution of 1870. From this premise it argues that the power was exhausted by the mortgage placed by Jay Cooke in 1870 and foreclosed in 1875, and that the subsequent mortgages were unauthorized. Of course, this contention is untenable. The Master's discussion leaves nothing more to be said (first report, R. 374). The validity of the mortgages issued after 1875 and foreclosed in 1896 is adjudged by the decree, and, as has been shown, has long been *res adjudicata*.

The company did not need authority of the Joint Resolution to mortgage its grant because there was no prohibition in the charter. Section 10 provides for public subscription to the stock.

> "and no mortgage or construction bonds shall ever be issued by said company *on said road*, or mortgage or

lien made in any way, except by the consent of the Congress of the United States."

The prohibition is confined to the *road.* This must have been so, for the reason that the lands were granted by Section 3 for the very purpose of "aiding in the construction of said railroad and telegraph line to the Pacific coast." As 25-mile sections were completed the lands were to be patented and were subject to sale.

The power to sell certainly includes the lesser power to mortgage. A mortgage was an appropriate method of raising money to aid construction. The *Platt Case, supra,* is here very much in point. The Joint Resolution removed the impediment with respect to the road. There was no need of authority to mortgage "its property and rights of property of all kinds and descriptions, real, personal, and mixed", for there was no prohibition. The proviso that the granted lands which do not remain subject to the mortgage by this act authorized" shall be subject to settlement, does not authorize a mortgage of the land; it merely takes the lands out of the settlement proviso in the event that they are included in and remain subject to the mortgage "hereby authorized." The mortgage "hereby authorized" was a mortgage of the road. There was no occasion to authorize a mortgage of the lands, for the Act of 1864 did not prohibit such a mortgage. It prohibits only a mortgage of the road. The Joint Resolution repealed that restriction. The Joint Resolution most certainly could not operate retroactively to require consent of Congress for a mortgage of lands. The contract under the Act of 1864 had been fully consummated prior to 1870. The act had been accepted by the company, the line surveyed at large expense, and con-

struction had already begun. *Forest Reserve Case,* 256 U. S. 51. To construe the Joint Resolution of 1870 as requiring consent of Congress, would be to make that act retroactive, and such a restriction on the power of disposition of the lands would be an impairment of contract. *Sinking Fund Cases,* 99 U. S. 700; *Forest Reserve Case,* 256 U. S. 51.

THE ISSUES RAISED BY THE PLEAS OF INNOCENT PURCHASER FOR VALUE IN THE ANSWERS OF DEFENDANTS BANKERS TRUST COMPANY AND CITY BANK FARMERS TRUST COMPANY HAVE BEEN RESERVED FOR FINAL HEARING AND ARE NOT INVOLVED IN THE PRESENT APPEALS.

The Bankers Trust Company, as Trustee under the Prior Lien Mortgage, and the City Bank Farmers Trust Company, as Trustee under the General Lien Mortgage, of Northern Pacific Railway Company, in their answers to the Government's complaint herein included all of the defenses asserted by the defendant Northern Pacific Railway Company and also set up certain separate defenses not pleaded by the Railway Company. The principal defense so pleaded was that as to the lands involved in the present litigation the mortgage trustees and the bondholders were and are innocent purchasers for value and not affected by the facts relied on by the Government to defeat or to cut down the title and the rights in such lands which are asserted by the Railway Company.

These special defenses are pleaded in paragraphs 23-30 inclusive of the answer of Bankers Trust Company (R. 89-91) and in paragraphs 37, 38, 51-54 inclusive, of the answer of the City Bank Farmers Trust Company (R. 122-128).

The Special Master dealt with these defenses briefly in subdivision XXII of his report (R. 388-390) and expressed the view that in part such defenses were available as against the Government but that in part they were not. He concluded, however, that if he was correct on the rulings made in respect of the rights of the Railway Company these pleas become immaterial except as applied to those lands falling within the rule laid down by him in connection with the Portage, Winnebago and Superior grant, but

that if on the other hand he was wrong, the doctrine of innocent purchaser could be taken up.

The Bankers Trust Company (R. 397) and City Bank Farmers Trust Company (R. 399 and 400) excepted to the failure of the Special Master to sustain the defenses of innocent purchasers for value in their entirety. The District Court in its opinion and order of October 3, 1935 sustaining the original Master's report (R. 407, 411) did not specifically deal with the issues raised on these defenses. Accordingly the two Trust Companies moved (R. 415) to amend the order so as to reserve until the final hearing all questions with respect to such defenses, and by its supplemental order dated January 29, 1936 (R. 418) the Court amended the order of October 3, 1935 so as to reserve "until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee."

Neither the Assignment of Errors of the plaintiff (R. 651 to 658) nor the plaintiff's Definite Statement of Points (R. 838-841) contain any reference to the issues so reserved in the last mentioned supplemental order of the District Court nor has the plaintiff made any objection to the reservation therein expressed. Similarly no reference is made to these issues in the Assignment of Errors (R. 660-661) or in the Statement of Points (R. 843) filed by the defendants.

The issues raised by these particular special defenses of the two Trust Companies have, therefore, not been disposed of in the court below and have by it been reserved for consideration on final hearing in the event that such issues become important by reason of the disposition made by this Court of the other issues of the case presented upon the present appeals.

PART II.

1, 2. Grant of 1864, Measure, Deficiency and Status on March 1, 1898.

The measure of the 1864 grant is stated in Finding II, (R. 606):

	Acres
Aggregate of odd sections	40,960,150.58
Deduction for conflict with prior grant to Portage, Winnebago & Superior R. Co...	347,141.24
Measure of grant	40,613,009.34

Credits

Lands received	37,883,905.33 acres
Adjudged entitled to patents for	417,111.61 acres
Total credits	38,301,016.94

Deficiency

Deficiency as of June 5, 1924, (date of Joint Resolution denying further patents), and at all times since	2,311,992.40

Status of 1864 Grant, March 1, 1898

Unsatisfied losses on March 1, 1898	5,946,664.99
Vacant, surveyed non-mineral land *in all indemnity limits of 1864 grant,* available for selection as of March 1, 1898	1,015,932.95

Lands restored to public domain in place limits, less 6,147.47 acres later placed in Absaroka forest	121,575.58	
Total lands available for selection as of March 1, 1898		1,137,508.53
Deficiency in Grant of 1864 as of March 1, 1898, after deducting lands available for selection		4,809,156.46

Withdrawals from First Indemnity Limits Grant of 1864.

Finding II (f), R. 607, is that the total withdrawals from first indemnity limits of the 1864 grant between March 1, 1898 and May 15, 1924 were 1,103,424.19 acres, to which should be added 180.25 acres in mineral indemnity limits in Wisconsin and Minnesota, making a total of 1,103,604.24 acres. On March 1, 1898, prior to withdrawals the company had losses of 4,809,156.46 acres (in excess of all lands available for selection) with which to select and take lands withdrawn on that date. A deficiency continued at all times between March 1, 1898 and June 5, 1924, the date of the Joint Resolution, and on the latter date the deficiency was 2,311,992.40 acres. So it is that the company had at all times during the period covered by all the withdrawals many more acres of proper losses than sufficient to select the 1,103,604.24 acres withdrawn from first indemnity limits of the 1864 grant. Finding II (e-1), and II (m), (R. 607, 612). Therefore, all of those withdrawals were invalid under the decision of this court in the *Forest Reserve Case.* The District Court so adjudged and award-

ed compensation for the 1,103,604.24 acres so withdrawn. Conclusions (c) and (d), (R. 612, 613) pp. 19 and 20. Decree, par. VII. (R. 643).

Withdrawals from Second Indemnity Limits Grant of 1864.

Second indemnity limits are provided by the Joint Resolution of May 31, 1870. Unlike first indemnity limits, wherein losses in any state are satisfiable in any other state, losses satisfiable in second limits are restricted by the Joint Resolution to those occurring in the same state; and, while losses occurring both before and after the date of the Act of July 2, 1864 are satisfiable in first indemnity limits, losses satisfiable in second belt are limited *in amount* to those occurring subsequent to the Act of July 2, 1864, so that both subsequent anl prior non-mineral losses may be used in second belt, subject to the limitation that they may not exceed the total losses occurring after July 2, 1864, in the same state. The Master so ruled, second report (R. 428) Conclusion (b), (R. 612).

The findings show, and the parties are agreed, that, counting only surveyed lands as available for selection, there was a deficiency in all indemnity limits (first, second and mineral) on the dates of the several withdrawals amounting to 961,992.84 acres from second indemnity limits except in the second indemnity limits of Idaho there was a small surplus on the date of the withdrawal of March 21, 1905. Therefore, all withdrawals from second indemnity limits are invalid except said one Idaho withdrawal, which was valid. The court below so adjudged and awarded compensation, Finding II, (e-1), (m), (R. 607, 612), conclu-

sions (c), (d), (R. 612, 613), Decree, paragraph VII, (R. 643).

Because of the stated restrictions on selection rights in second belt, the unsatisfied losses, on June 5, 1924, of 2,311,992.40 acres, included only 193,728.74 acres of losses which are satisfiable in those limits. The remainder are mineral losses mostly and are usable only within 60 miles of the railroad. As second indemnity limits are between 50 and 60 miles in the territories, mineral losses could not be used in Montana and Idaho in those limits (Sec. 3, Act of July 2, 1864). Accordingly, the decree awards compensation for only 193,728.74 acres to be selected by the company from the 961,992.84 acres withdrawn from second limits. Decree, Par. VII, (R. 644). The selections have been made accordingly.

Notwithstanding the company did in fact sustain far more than sufficient subsequent losses, satisfiable in second indemnity limits, to have taken all of the lands withdrawn from second limits, it happened that they became available prior to 1895. At that time the company had few, if any, mineral losses for use in first limits and was obliged to use subsequent losses in first limits to save the land from preemption by settlers. Afterwards, the mineral classification act of 1895 was passed, and some 3,800,000 acres of place lands were classified mineral. Had this classification occurred prior to 1895, the company would have used the mineral losses to select lands in first indemnity limits, and saved its subsequent losses for use in second limits. Out of this condition the company's claim for so-called "substitution of base" arose. The company asked, and the Master permitted, substitution of mineral losses in first limits and released the subsequent losses for use in second limits.

Under this ruling the company had ample losses with which to take all the 961,992.54 acres withdrawn from second limits. But the District Court set aside the Master's ruling so that the company only had left sufficient non-mineral losses usable in second belt to select 193,728.74 acres withdrawn from second belt. The company has not appealed from this ruling and it may be right. It nevertheless remains that, because of the delay of the Government in making the mineral classification, the company has been deprived, wholly without its fault, of the opportunity and right to select the balance of the 961,992 acres of indemnity lands withdrawn from second indemnity limits. It is left with 1,014,659.22 acres of mineral losses which can never be satisfied.

MEASURE OF THE 1870 GRANT—INVALIDITY OF WITHDRAWALS FROM FIRST INDEMNITY LIMITS OF 1870 GRANT.

The measure of the entire grant by the Joint Resolution of May 31, 1870, after deducting for the Tacoma Overlap (that being the only deduction), is stated in Finding II, Validity or Invalidity of Withdrawals, Grant of 1870, (R. 613), summarized as follows:

Aggregate of odd sections within place limits	2,827,438.70
Deduction for Tacoma Overlap	637,580.99
Measure of grant of 1870	2,189,857.71

Credits

Lands received	1,589,463.75 acres	
Adjudged entitled to patents for lands outside withdrawals..	11,875.07 acres	
		1,601,338.82
Deficiency as of June 5, 1924 and at all times since		588,518.89

Status of Grant March 1, 1898

Unsatisfied losses (excluding Tacoma Overlap), as of March 1, 1898	626,073.61
Vacant surveyed non-mineral lands available for selection as of March 1, 1898 ...	32,417.67
Deficiency as of March 1, 1898	593,655.94

Withdrawals from First Indemnity Belt.

There were withdrawn from first indemnity belt of the grant of 1870, at various dates between March 1, 1898 and December 15, 1913, 155,727.84 acres. Finding II (f)—Grant of 1870, R. 614. A deficiency in the grant of 1870 continued from March 1, 1898 to June 5, 1924 and still exists. Finding II (h), (i)—Grant of 1870, R. 615. The parties are agreed that the company had at all times many more than sufficient proper losses for selection of all lands withdrawn from first limits of the 1870 grant. The court so found and awarded compensation for the

155,727.84 acres. Conclusions (b) and (c), R. 615. Decree, Paragraph VII, R. 643-4. It should be said, and the parties are agreed, that there was a large deficiency in the grant of 1870 at the date of the several withdrawals even if all lands, both surveyed, *unsurveyed,* and mineral be counted.

Withdrawals from Second Indemnity Limits Grant of 1870.

These withdrawals are the subject matter of defendants' appeal. It is admitted that if the court's ruling with respect to the Tacoma Overlap be correct, the withdrawal of 213,001.66 acres, less 16,240 acres also within first indemnity limits of the grant of July 2, 1864, was valid. Otherwise the withdrawal was invalid.

NEITHER UNSURVEYED NOR MINERAL LAND CAN BE COUNTED TO DETERMINE LANDS AVAILABLE FOR INDEMNITY AFTER THE WITHDRAWALS. (Govt's. Points 7 and 11, p. 139 and 171).

The Government admitted that all of the withdrawals, except the one Idaho withdrawal of 1905, were invalid, under the *Forest Reserve Case,* if mineral lands and unsurveyed lands be excluded in computing remaining lands available for selection after the withdrawals. In this court it does not contend that mineral lands should be counted, and we might assume that contention has been abandoned. We will, however, give it brief mention.

(a) As to the lands ascertained to be mineral after they were withdrawn:

The grant of July 2, 1864 is of public lands *"not mineral."* The third proviso of Section 3 is as follows:

> "That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided."

It is obvious, of course, that lands ascertained to be mineral at any time must have been mineral at the time they were withdrawn and from the time nature placed minerals in the land. By the decision in *Barden v. Northern Pacific,* 154 U. S. 288, mineral lands were excepted and were never obtainable under any circumstances. See Master's second report, (R. 500). To make doubly sure that mineral lands were excepted from the grant under *all* circumstances Congress passed a Joint Resolution (13 Stat. 567), in part as follows:

> *"No act* passed at the first session of the Thirty-eighth Congress (that being of the year 1864) granting lands to States or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specifically provided in the act or acts making the grant." (Italics supplied.)

Mineral lands in indemnity limits were no more obtainable than in place limits. It is a contradiction in terms to say that lands which never could be obtained were available for indemnity. Therefore the Master held that mineral lands could not be counted to determine whether there were

enough available lands after the withdrawals. Second Report, R. 500.

In the *Barden Case,* the Court said:

> "It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, *whether known or unknown,* and not merely such as were at the time known to be mineral."

(b) *As to unsurveyed lands.* (Gov't Point 11, Brief, p. 171).

The Master's second report considers this question, (R. 500). The Government has not taken the trouble to show what effect, if any, sustaining this contention would have on the decree. It is *moot* as to withdrawals from first indemnity limits of the 1864 grant. The excess of unsatisfied losses above all surveyed, non-mineral land in all indemnity belts, as of March 1, 1898, was 5,946,664.99 acres, as shown by Finding II, (R. 606). Losses which could be satisfied only within fifty miles of the road were 4,408,823.40 acres. There were surveyed lands within first indemnity limits of 486,414.48 acres. So deducting said area of surveyed land from the preceding figure the remaining losses satisfiable only within fifty miles of the line were 3,922,408.92 acres. Vacant *unsurveyed* lands in first indemnity limits on December 31, 1897 were 3,816,313.11 acres of which 632,827.03 were mineral. The balance of unsurveyed lands was 3,183,486.08 acres. Therefore, there was a deficiency in first indemnity belt on December 31, 1897 of 738,922.84 acres, *even if unsurveyed lands be counted as available.* These figures are taken from the findings and Government Exhibits 82, 85, 88 Rev., 90, 93, 98, 100 and 105 Supplemental.

It is admitted that a deficiency continued during all of the period covered by the withdrawals and down to June 5, 1924, date of the Joint Resolution suspending patents.

As to second limits, of Montana, the Government's exhibits showed, counting unsurveyed lands, an excess of 756,522.40 acres on December 31, 1897, which on the face of it would validate the large withdrawal of 1898 if unsurveyed lands were counted. But the Government does not include as losses 652,275.67 acres of subsequent losses in Montana which the Government would not credit to the company because of the erroneous ruling of the Secretary of the Interior that the eastern terminus was at Duluth. This court reversed the Secretary in the *Eastern Terminus Case,* 177 U. S. 435, and held the eastern terminus was at Ashland, not at Duluth. Therefore this 652,275.67 acres must be added. Deducting the correct figure for losses from the excess shown by Government Exhibits would leave only 104,246.73 acres. The large withdrawal of March 1, 1898 was for 279,539.53 acres. Thus there is a deficiency of 175,292.80 acres after the withdrawal, and therefore the withdrawal is invalid. For the same reason the situation resulting from the reversal of the Secretary in the *Eastern Terminus Case* invalidates every withdrawal from second limits of Montana except, possibly, the withdrawal of July 14, 1899 of 4,004.38 acres. The Government did credit the 652,275.67 acres (arising out of the Eastern Terminus decision), in 1902, as shown by its Exhibit 91. After that date the Government's exhibits will show a deficiency provided only that the mineral lands be also deducted as not available and proper credit be made for Montana prior non-mineral losses which the company is entitled to use to the extent that the total losses do not exceed the losses subse-

quent to July 2, 1864. The Government, of course, must now concede that the mineral lands should be deducted as not being available as they are making no contention in this court on that point.

As to Idaho, we do not go into detail as, counting unsurveyed lands as available, all withdrawals are valid except the withdrawals of December 11, 1906, March 2, 1907, and May 25, 1915, totaling 3,684 acres. The withdrawals which would be valid by counting unsurveyed lands amount to about 260,000 acres. But by the decree defendant is awarded compensation for 193,000 acres in second limits, of which only 23,364 acres are in Idaho second limits. So it is seen that the effect of sustaining the Government's contention as to counting unsurveyed lands would affect compensation for only 23,364 acres in Idaho. As to all the other withdrawals, the question is moot, with the possible exception of 4,004.38 acres in Montana noted above. We will, however, show that the Master is supported by repeated decisions of this court and by the decisions and practice of the Government's Land Department itself until the exigencies of this case seemed to require a reversal of position.

That unsurveyed land might have been taken by settlers if not withdrawn is immaterial. Decisions of this Court and of the Land Office are that Unsurveyed Lands Cannot Be Counted to Determine Lands Available For Selection.

The findings are that, after the large withdrawal of March 1, 1898, the vacant, *surveyed,* non-mineral land *available for selection,* was insufficient to satisfy the losses. Therefore, under the *Forest Reserve Case,* the withdrawals were invalid. But the Government contends that all *vacant*

lands, whether *available* for selection or not, must be counted. It makes a distinction between "lands available for indemnity" and "lands available for selection." It insists that lands were available for "indemnity", even though unsurveyed, if they were vacant in the indemnity limits. This is to say, that the lands are "available" though they cannot be obtained. This is a mere juggling with words. Master's report, (R. 501). It is admitted that settlers could and did locate on unsurveyed lands with the right to acquire them under the homestead and pre-emption laws when surveyed. This right of settlers is superior to the right of the company to select after survey. *Hewitt v. Schultz,* 180 U. S. 139; *Weyerhaeuser v. Hoyt,* 219 U. S. 380; *Forest Reserve Case, supra.*

Finding II (e-2), (R. 607) is that

> "The Secretary of the Interior would not accept selections by the Railway Company of indemnity lands prior to survey and plat thereof being filed in the local land office. Said rule was in effect on March 1, 1898 and at all times subsequent thereto."

Conclusion (a), (R. 612), is that

> "In determining the validity of said withdrawals in indemnity limits neither land unsurveyed at date of withdrawal nor lands thereafter classified as mineral can be counted."

The Supreme Court, in the *Forest Reserve Case,* said:

> "The lands in question were not surveyed in the field until near 1905 and the plat of survey was not filed in the local land office until April 5, 1905. This indemnity selection was made later in the same day. On several occasions prior to 1905 the company had endeavored to select lands in the indemnity limits while

> they were as yet unsurveyed, or before the plat of the survey was filed in the local land office; but the Secretary of the Interior had refused to consider such selections and had directed that none be received until after the land was surveyed and the plat filed. *Thus this selection was made as soon as was admissible under the Secretary's directions.*" (Italics supplied.)

Section 3 of the 1864 Act provides that the selections shall be made "*under the direction of the Secretary of the Interior* in alternate sections, and designated by odd numbers." (Italics supplied.)

The Government urged the point that because settlers might take up unsurveyed land withdrawals could be made in disregard of the rights of the railroad in the *Forest Reserve Case*. It was denied. The court said that, when the grant was made, it was thought that the indemnity limits contained lands largely in excess of what would be required to supply losses within the place limits, and hence the provision in Section 6 under which all lands in the indemnity limits were to remain subject to the operation of the homestead and pre-emption laws. The court said:

> "Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant the company must submit to whatever of disadvantages results from it. This the company frankly recognizes, for in its brief it says: 'It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under the homestead and pre-emption laws'; and also, 'The question here is not whether in the face of the deficiency the settler (before selection) may acquire rights superior to ours, for we concede that he may.'" (p. 64)

"But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the Government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say 'required' because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses." (p. 65).

The court concluded the discussion as follows:

"Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose it could take all and thereby wholly defeat the provision for indemnity. But it cannot do either. The 'substantial right' conferred by that provision (*Weyerhaeuser v. Hoyt, supra*), cannot be thus cut down or extinguished. (*Sinking Fund Cases,* 99 U. S. 700, 718."

This decision certainly is that the Government cannot appropriate unsurveyed indemnity lands to its own use, because they might have been lost to settlers. In the *Forest Reserve Case* the lands were unsurveyed when withdrawn. The Company's selections were filed as soon as the lands were surveyed and plat filed in the local land office.

In the *Forest Reserve Case,* the company, to prove a deficiency, relied on a stipulation of facts and a special report of the Commissioner made in 1906, purporting to show that the adjustment of the grant of 1864 had reached a

point where there was disclosed a net deficiency of more than 4,000,000 acres. The court said that the report of the Commissioner was insufficient evidence because the adjustment of the grant was the duty of the Secretary of the Interior and it was not shown that he had approved the Commissioner's report. The stipulation of facts upon which the case was tried, quoted at p. 62 of the opinion, is as follows:

> "'The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains; but the plaintiff does not admit that the correct measure of the grant is the aggregate of all odd-numbered sections within the primary or place limits, or that any definite quantity of land was granted and guaranteed to the defendant by any of the acts of Congress making grants of land to the defendant or its predecessor or predecessors in interest.)'" (p. 62).

The court held that the stipulation was insufficient only because the Government did not admit that the correct measure of the grant is the aggregate of the odd-numbered sections, as stated in the stipulation. The court said:

> "The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections, or (b) the route of this road and that

of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company. There would be no right to indemnity as respects the moiety not included, nor as respects the lands required to be deducted. Either of those conditions, if existing, would affect the measure of the grant and would have to be considered in determining whether there was a deficiency. The stipulation does not show the presence or the absence of either condition, and the matter is not one of which courts take judicial notice. Therefore, the actual situation, whatever it may have been, should have been shown. As this was not done, neither party is entitled to have the question whether there was a deficiency determined upon the present record." (pp. 68, 69).

Accordingly, the case was remanded to the District Court for further hearing to perfect the showing. *The omission has been supplied in the present record.* It has been shown that the only deduction from the measure of the grant as above defined was 347,000 acres for conflict with the prior grant to the Portage, Winnebago & Superior Railroad Company. Finding II (a), (R. 606). The exception, under the moiety rule, though asserted by the Government, has been abandoned, and is not here present. See Master's first report, (R. 328).

The stipulation of facts in the *Forest Reserve Case,* by its terms, excludes unsurveyed or other land which the defendant could not take *under the regulations of the Land Department.* The wording of the stipulation was most certainly not inadvertent because both parties knew that large areas of land within the indemnity limits were unsurveyed in 1905 when the withdrawal in question was made. Of

course, the stipulation could not have been made without recognition of that fact. The Master took this view. After quoting the stipulation, the Master said:

> "The only reason the case was not decided upon the stipulation was that the government did not admit that the correct measure of the grant was the aggregate area of all the odd-numbered sections in the primary or place limits.
>
> "It is thus apparent the court was dealing only with the lands which the company was entitled to select; and as neither mineral land nor unsurveyed land was open to selection it is certain they were excluded in declaring the doctrine of the case. But even without this perfectly obvious consideration, the logic and the whole theory of the case rests upon the assumption that the lands which were left could be gotten by the company. It is neither good sense nor good logic to say that they were available to the company either potentially or otherwise when they could not have been obtained." Second report, (R. 502).

Finding II (m) (R. 612) follows the stipulation of facts in the *Forest Reserve Case.*

Land Department Ruling that Unsurveyed Lands Are Not Available for Selection.

As early as 1895, in a Northern Pacific case, 20 L. D. 187, the question was whether in making the indemnity selections the lands nearest the road should be first taken. Secretary Hoke Smith ruled that "only such lands within the indemnity limits should, in my opinion, be taken into the calculation as are *available* for selection, by which is meant

surveyed lands subject to selection. *Atlantic & Pacific R. R. Co.* on review, 17 L. D. 313." (Italics supplied.)

In this court the Government argues that the company might not have selected the withdrawn lands because not worth the cost of survey and selection. This argument was not made below nor in the *Forest Reserve Case,* and hardly seems to require an answer. There is no evidence as to the value of any of the withdrawn lands and nothing to support the Government's argument. If some of the withdrawn lands are of little or no value, as claimed, the Government will be required to pay little or nothing for their expropriation.

The Odd Sections Have no Existence Before Official Survey.

Only *odd* sections can be selected. Until surveyed there are no *odd* sections. In *Sawyer v. Gray,* 205 Fed. 160, 163, speaking of an application to purchase unsurveyed lands, the District Court for the Western District of Washington said:

> "The township plat having been filed in April, 1901, the lands in dispute were unsurveyed at the time of the first alleged selection, in March, 1900. The government survey *creates,* not merely identifies, sections of land. There were no such lands as those described in the first application at the time of selection." U. S. v. Curtner (C. C.), 38 Fed. 1, at 9 & 10; So. Pac. R. Co. v. Burlingame, 5 Land Dec. Dep. Int. 415, 417, and cases cited; Robinson v. Forrest, 29 Cal. 317, 325; Middleton v. Low, 30 Cal. 596, 604, 605; Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919, 920; Smith v. City of Los Angeles, 158 Cal. 702, 112 Pac. 307, 310." (Italics supplied.)

This case is cited with approval in *Cox v. Hart,* 260 U. S. 427, which construes the Act of March 28, 1908, restricting the right to enter desert land, to "surveyed" land. The court said:

> "It is true the lands had been surveyed in 1854-1856, but the lines of that survey by the year 1900 had disappeared to such a degree that for practical purposes they had become non-existent. A survey of public lands does not *ascertain* boundaries; it *creates* them. *Robinson v. Forrest,* 29 Cal. 317, 325; *Sawyer v. Gray,* 205 Fed. 160, 163. * * * Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed and not subject to disposal as surveyed lands. *United States v. Morrison,* 240 U. S. 192, 210; *United States v. Curtner,* 38 Fed. 1, 10." (p. 436).

In *Douglas v. Rhodes,* 280 Fed. 230 (D. C. Ark.), the court said:

> "Unsurveyed lands are not *'public lands'* within the meaning of the law so as to be subject to sale, entry or disposal under the laws of the United States. Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Buxton v. Traver, 130 U. S. 232, 235; Bardon v. Northern Pacific R., 145 U. S. 535, 538; Barker v. Harvey, 181 U. S. 481, 490; Minnesota v. Hitchcock, 185 U. S. 373, 391." (p. 231) (Italics supplied.)

The grant is of "every *alternate section* of *public* land, not mineral, designated by *odd* numbers." (Italics supplied.) The indemnity clause is that "other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by *odd* numbers." (Italics supplied.) It is

obvious that, until survey there were no lands to which the indemnity right could or did attach.

United States v. Montana Lumber Mfg. Co. and Northern Railroad Company, 196 U. S. 573, was an action by the United States to recover the value of timber cut from unsurveyed lands within place limits of the grant. Evidence was offered to prove that, by a survey made by the Railway Company, the land was an odd section. The court said that, though the grant is in praesenti, yet the survey is reserved to the Government in whom remains the legal title. *Deseret Salt Company v. Tarpey,* 142 U. S. 241. "As expressed in *Leavenworth & c. Railroad Co. v. United States,* 92 U. S. 733, 741, 'They' (the words 'there be and is hereby granted') 'vest a present title, . . . though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract.' The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey by Ashley. It was also error to instruct the jury to return a verdict for the defendants. Until the identification of the even and odd-numbered sections the United States retained a special property, at least in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. A contrary conclusion would impair the Government's right of survey and force it into controversies over surveys made by the railroad or its grantees * * *. Indeed it would reverse the statutory grant of powers and tranfer the location of the sections from the Government to the railroad company. The effect of the right and duty of the Government to make its own surveys is stated in the following cases: *Maguire v. Tyler,* 8 Wall. 650; *Cragin v. Powell,* 128 U. S. 691; *United*

States v. McLaughlin, 127 U. S. 428; *Blake v. Doherty,* 5 Wheat. 358; *Central Pacific Railroad Co. v. Nevada,* 162 U. S. 512; *United States v. Hanson,* 16 Pet. 196; *Les Bois v. Bramell,* 4 How. 449; *Mackey v. Dillon,* 4 How. 421; *Glenn v. United States,* 13 How. 240; *Smith v. United States,* 10 Pet. 326.

Northern Pacific v. Lane, 46 App. D. C. 434, referred to above, leaves nothing to be said. That case was a suit to restrain the Secretary of the Interior from cancelling a blanket selection of unsurveyed lands withdrawn and placed in the Priest River forest reserve. The court held that until survey and identification of the odd sections, selection rights could not be exercised, following *Hewitt v. Schultz,* 180 U. S. 139; *United States v. Morrison,* 240 U. S. 192.

It is clear, therefore, that the decision of the Master and the District Court on this point was correct.

As to the grant of 1870:

It is conceded that there was on March 1, 1898 and at all times thereafter to the present time a very large deficiency in the 1870 grant, even counting surveyed, unsurveyed and mineral lands. The point is therefore moot as to this grant.

IDAHO WITHDRAWALS AND RESTORATIONS

(Govt. Point 12, Brief, p. 178)

We will discuss this subject under the following points:

(a) The point is not open in this court as it was not raised below.

(b) The Government's statement of facts is incorrect and incomplete.

This contention is new in this court. It was not submitted below and not considered by the Master and, therefore, no findings were or could have been made with respect to it. It cannot be raised for the first time in this court. Cases cited *supra*.

We are within our rights in protesting against repeated changes in position by the Government in this court, and especially raising in this court questions which were not raised below so that this court has not the benefit of findings and decision by the lower court. The argument is misleading and inaccurate, not only by reason of erroneous statements of fact, but because of the failure to state material and controlling facts.

It is said at p. 179 that 270,783.37 acres were "available to be surveyed" at the time of the withdrawal of March 1, 1898. "All these acres," says the Government, "the Railway Company could have caused to be surveyed." The answer to this statement is that it is not correct. The matter of surveys was within the control of the Government, not of the Railway Company. If the railroad company could have caused surveys to be made, it would not have sat idly by and permitted its indemnity limits to be depleted by

settlers. The fact is that either through inattention or design the Government surveys were delayed to the great loss of the company and depletion of its indemnity limits. It is said that although there were only 5,640.78 acres of deficiency on March 1, 1898, after crediting 25,500.72 acres of surveyed lands in second indemnity limits not withdrawn, the District Court improperly treated the withdrawal of 163,280 acres as invalid. The Government here complains that the company was given the statutory right by Section 3 to make its own selections. While, of course, the withdrawal was invalid as there was a deficiency, the only effect is that the company can select from the withdrawn lands an acreage equal to its unsatisfied losses. This is exactly what Section 3 provides. The indemnity clause provides that if lands have been granted, disposed of, etc. within place limits, "other lands shall be *selected by said company* in lieu thereof." So that the withdrawals, being admittedly invalid under the holding of the *Forest Reserve Case,* the company is given its right under Section 3 to make its own selections from the withdrawn lands. This is no more and no less than the company had by Section 3 if the lands had not been wrongfully withdrawn.

We said above that the Government's argument is incorrect and misleading. It is pretended that the company could, *on March 1, 1898,* have taken 25,500.72 acres that were surveyed but not withdrawn. Those lands are admitted to be in second indemnity limits. The Secretary of the Interior did not lay down second limits in Idaho until *March 1, 1906* (N. P. Exhibit 131). No selections could be made until second limits were laid down by the Secretary. It results, therefore, that the Government's statement that the 25,500.72 acres could have been selected, leaving only

5,640.78 acres to be selected from withdrawn lands, is incorrect. This of itself is enough to dispose of the point.

Another fact conclusive against the Government's position is that it is not true that the company had only 31,141.50 acres of proper losses on March 1, 1898. The fact is that it had approximately 55,000 acres of additional losses which at that time the Secretary would not credit to the company. These losses arose out of the erroneous opinion of the Secretary that in the so-called Wallula Overlap the company was entitled to only a moiety of odd sections. In 1906 he corrected this ruling. Of course, the company could not be deprived of its rights as they existed at all times since definite location of the road in 1883 or 1884 by erroneous rulings of the Secretary. The Wallula Overlap point, that the company was entitled to only a moiety of odd sections, is pleaded but was abandoned at the hearing, as already shown.

If the Government had made its present contention below, all of these facts would have been considered and found by the Master, as there was no controversy concerning them.

3. HOMESTEAD FILINGS ON WITHDRAWN LANDS.

(Govt. Point 13, Brief, p. 181)

As the withdrawals were invalid and the company is given compensation therefor by the Act of 1929, it is immaterial what disposition was made of the lands after withdrawal. Section 1 of the Act of 1929 in part is:

> "That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company *upon the dates of the withdrawals* of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States." (Italics supplied).

The words italicized are those which the Government's argument overlooks. These lands, comprising 2,480.91 acres, (out of 3,710.31 acres), were withdrawn from Montana, Wyoming and Washington first and second limits.

The Master's Finding XI, Second Report (R. 527), shows that these lands were entered by settlers *"after withdrawal"* and prior to June 5, 1924. Therefore, they were at date of withdrawal subject to the indemnity selection

rights of the company, and for those lands the act expressly provides compensation. The Master said: "What the government did with the lands after they had been placed, by withdrawal, beyond the reach of the company, can have no effect whatever upon the company's rights." See also the court's finding XII, (R. 629).

4. NORTHERN CHEYENNE INDIAN RESERVATION WITHDRAWAL.

(Govt. Point 10, Brief, p. 166)

An Indian Reservation is within the words, "or other government reservations" as used in the Act of June 25, 1929.

The Government contends that an Indian reservation is not within the words, "or other Government reservation", as used in the Act of 1929. We submit this point on the Master's second report, (R. 468), which we will supplement by citing some additional cases.

The point is directly ruled by *Leavenworth, etc. R. R. Co. v. United States*, 92 U. S. 733, followed in *Northern Pacific v. Musser-Sauntry*, 168 U. S. at p. 609. In the last cited case the court said (speaking of the *Leavenworth Case*):

> "And it was contended that an Indian reservation was not excepted from the grant because the lands were not reserved to the United States. Upon this the court said (pp. 741, 747); '* * * Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes.'"

The right that the Indians hold in lands within an Indian reservation is that of occupancy, the fee and right of dis-

position being in the Government. The Government has power to dispose of lands within an Indian reservation without consent of the Indians. *Beecher v. Wetherby,* 95 U. S. 517, 525; *Spalding v. Chandler,* 160 U. S. 394, 402-407; *United States v. Midwest Oil Co.,* 236 U. S. 459. The opinion of Attorney General Brewster to the Secretary of the Interior, January 17, 1882, 17 Op. Atty. Gen. 258, 260, is a good discussion of this subject. *Minnesota v. United States,* 305 U. S. 382, holds that the United States is an indispensable party in a condemnation action brought by the state to acquire right of way over lands which the United States holds in trust for Indian allottees.

The Government's argument states that certain of the lands in question were allotted in severalty, but the Master shows that it is not claimed that any of the lands here involved were so allotted; but, even so, that circumstance would not affect this question.

The Government's argument may be confusing as to the status of the land at date of withdrawal. We wish to make it plain that they were withdrawn in 1900 for this Indian reservation. Prior to and *at date of withdrawal* they were not subject to any Indian or other claims. They "were or would be" subject to indemnity selection by the company at date of withdrawal. As in the case of lands taken by homesteaders, it is immaterial what disposition the Government afterward made of the withdrawn lands.

5. AGRICULTURAL LANDS.

(Govt. Point 3, Brief, p. 66)

We will discuss the following points:

(a) The words, "agricultural lands", in the mineral indemnity clause of Section 3 of the Act of July 2, 1864, mean any lands other than mineral lands. They are used as words of classification, not definition, p. 161.

(b) The long settled meaning of the words, "agricultural", "agricultural lands", "mineral lands", in acts of Congress, decisions of the Land Office and courts is conclusive, p. 163.

There are two indemnity clauses in Section 3 of the 1864 act; one, the general indemnity, and the other, the mineral indemnity. The general indemnity clause is as follows:

> "and whenever, prior to said time (definite location), any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The mineral indemnity clause is as follows:

> "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated *agricultural* lands, in odd-numbered sections, nearest to the line of said road

and within fifty miles thereof, may be selected as above provided." (Italics supplied.)

The Government, though it admits that any lands not mineral, including coal and iron lands, may be taken for general losses, contends that for mineral losses only "tillable" lands may be taken.

(a) Even were the question of first impression, the Government's position is untenable. The meaning of the word "agricultural", in the third proviso of Section 3, has been settled for a century. In repeated acts of Congress, decisions of the Secretaries of the Interior, and courts, the word "agricultural" has been used in contradistinction to "mineral." This is aside from laws defining certain kinds of lands, such as swamp lands or desert lands, *co nomine*. But the word had received the meaning stated long before there were any such acts. The mistake which the Government makes is in treating the words, "agricultural" and "mineral" as words of definition. Both words have been used as words of classification ever since the United States acquired its public lands. They are technical terms. In common use and by the dictionary, granite, guano, asphaltum, petroleum, etc. are certainly not minerals. Yet those substances are classed as minerals in the land laws as administered by the United States Land Department and construed by this court. See Master's Second Report, (R. 449). By the same token, the word "agricultural" includes grazing, timber, swamp, desert, lands covered with water, and all other lands except mineral. The Master sufficiently proves this.

Never before this suit was tried was it contended that the words "agricultural lands", as used in the act of 1864, have the meaning so belatedly attributed to them. The Government introduced its discussion before the Master with these words, "This issue is squarely presented for the *first time* in this court." Not only is the statement literally true as made, but the Government might have said with equal truth that it was made even in this case *as an afterthought,* and after the Government had closed its evidence. (Government rested at June, 1936 hearings, Statement of Evidence [unprinted], p. 243). (Testimony first introduced at hearings in January, 1937, over objection that it was not proper rebuttal, Unprinted statement of evidence, pp. 331, 332.) The Government reopened the case to offer evidence of employs of the Forest Service that of the withdrawn lands in question only 10,803.17 acres are "agricultural", available for selection, by the Government's definition, as compared with 1,333,032.72 acres of withdrawn land which are not mineral lands. The withdrawn lands are, of course, typical of all lands in the indemnity limits in the mountainous areas of Montana, Idaho and Washington. So, the Government is now saying to this court and to the Northern Pacific that less than 1% of indemnity lands are available to satisfy mineral losses. Remember that the Government has classified in four land districts of western Montana and Idaho 3,742,267.56 acres of place lands as mineral. For this loss there would be no possibility of indemnity, as it is conceded that the large losses of pre-empted or otherwise disposed of lands coming under the general indemnity clause accrued in the farming regions east of the Missouri River where the indemnity limits had been exhausted by selections and settlements long prior to the mineral classifica-

tion of 1895. Is it surprising that the Master, (R. 461), said that the Government's contention was "grotesque", "preposterous", and "absurd?" This contention is but another pretext for not complying with the decision of this court in the *Forest Reserve Case*.

(b) The words, "agricultural lands", and "mineral lands", had an established meaning in the land laws both before and after the Act of July 2, 1864. The following is a digest of some statutes to which the Master referred.

The Act of July 27, 1866 (14 Stat. 292) makes a grant to the Atlantic & Pacific Railroad Company. Both the general indemnity clause and the mineral indemnity clause are identical in meaning with those in the Northern Pacific grant. The Act of March 3, 1871 (16 Stat. 573) makes a grant to the Texas & Pacific Railroad and contains a general and mineral indemnity clause like the Northern Pacific. The mineral indemnity clause of the Atlantic & Pacific grant is as follows:

> "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

Similarly, the Texas & Pacific grant excepts mineral lands and provides for selection of "a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said road" etc. Both these grants have been administered exactly like the Northern Pacific grant, mineral losses being accepted as base lands for all non-mineral lands. It is undisputed that the

Land Department, in the administration of the third proviso of Section 3 of the Northern Pacific grant, only required proof that the lands were not *mineral* and were not *coal* or *iron* lands. The idea that indemnity lands must be tillable did not occur to the Land Department, nor to anyone else except counsel in this case. Witness Schwarm testified that prior to about 1912 the proof required to support mineral indemnity selections was that the land was non-mineral, and at that time no showing as to non-coal or iron character was required. After about 1913 the proof required was that the selected lands were non-mineral, non-coal and non-iron (Unprinted statement of evidence, p. 396.) This proof has been made in this case. The testimony is uncontradicted. At the hearing before the Joint Committee of Congress, Government counsel quoted the letter of Acting Secretary Finney of May 6. 1925 in answer to an inquiry submitted by the Joint Committee to the Secretary of the Interior. The last paragraph of the letter reads:

> "In the administration of the Northern Pacific Railroad grant, and other grants containing similar language, the department in passing upon indemnity selections, treated the third proviso to Section 3 as meaning that in lieu of mineral losses the company could take, within the limits defined, unoccupied and unappropriated non-mineral lands, whether such lands were in their natural condition ready for the plow, or whether as a prerequisite to cultivation, they had first to be cleared, drained, or irrigated." (JCR p. 2529).

During the Joint Committee hearings Mr. Patterson, attorney for the Interior Department, said:

"Mr. Patterson: That is correct, Mr. Chairman. We have construed it in the broad sense as agricultural, as distinguished from mineral, and in that sense *all non-mineral* lands were subject to selection in lieu of mineral losses. * * *

"Mr. McGowan: I think, stating it another way, the interpretation has been that the word 'agricultural' that has just been referred to meant non-mineral.

"Mr. Patterson: That is right. That is distinguishing it from the term 'mineral' used in the same act." (JCR 2420) (Italics supplied)

In the Government's brief, pages 91-92, reference is made to statements by Mr. Kerr during the Joint Committee hearings. Examination of the pages cited shows there was a discussion between Mr. Patterson, members of the Committee and Mr. Kerr, principally upon the requirement as to cultivation under the homestead law and as to what lands under the mineral classification act of 1895 should have been classified as mineral. Mr. Kerr made the statements referred to while he was arguing for his interpretation of the homestead law to the effect that a settler might acquire timber land or any other non-mineral land usable for nin-tillable purposes.

In an opinion, 14 Op. A. G. 115, given August 31, 1872 to the Secretary of the Interior, the Attorney General held in part:

"Public lands for the purposes of sale are divided into agricultural and mineral lands. The minimum price of the former is $1.25 and the latter $5 per acre. Mineral lands, exclusive of their valuable deposits, are generally worth little or nothing." (p. 116).

Commissioner Drummond in *State of Nevada v. Surveyor's Mineral Return* (April 3, 1874), 1 Copp's Land Owner, p. 18, said:

> "Congress has from its *earliest legislation* in reference to public lands made a distinction between lands which are mineral and those which are agricultural, and this distinction has been invariably enforced in every public land law enacted by that body up to the present time." (Italics supplied)

The Act of July 26, 1866 (14 Stat. 251) opened mineral lands to exploration. Section 10 provided that wherever homesteads had been entered on lands designated as mineral but upon which no mines were discovered and which were properly agricultural lands, the settler might take 160 acres. In a decision by Acting Secretary Cowen, reported in Sickels' Mining Laws and Decisions, pp. 443-444, he construed Section 10, and said:

> "Congress did not, I think, intend in this act to do away with the well established distinction, so long recognized by legislation, between agricultural and mineral lands, or to allow lands actually mineral to be acquired under agricultural laws."

In a circular issued under this act, January 14, 1867, referred to in the dissenting opinion in the *Barden Case,* 154 U. S. at p. 344, the surveyor is required to show the "agricultural lands and represent the same on township plats by the designation of 'agricultural lands'", and it appears from the opinion that the only distinction made was between lands which were "mineral or not mineral." The surveyors were never required to describe various kinds of lands that were non-mineral. It was always a question

of whether the lands were mineral or agricultural. See the instructions in the 1868 report of the Commissioner of the General Land Office; pp. 148-150 where instructions are given under the 10th and 11th sections of the Mining Act of July 26, 1866 (14 Stat. 251). Instructions to the Surveyor General provided only for return of notes showing tracts "which are agricultural" and that

> "After the filing of the plats in the district land offices, if no counter-affidavits are presented, the tracts designated agricultural may be filed upon under the pre-emption or taken under the homestead laws.
>
> "Timber lands on rocky hills and mountains, not known to contain any of the aforesaid minerals, will be designated as 'agricultural', and, if the contrary, as 'mineral.'
>
> "Placers, once valuable, but which have become exhausted, so as no longer to be valuable as mines, will be returned as agricultural." (pp. 148-150).

In 2 L. D. 712, *Hooper v. Ferguson* (1883), the Secretary discusses the instructions to the Surveyor General as requiring the field notes to show whether the lands were agricultural or mineral. Concluding, the Secretary said:

> "Wherefore I concur in your opinion that the tract in contest was *prima facie* agricultural, and that its mineral character could not be ascertained without such hearing."

Secretary Lamar, in 6 L. D. 493, discussing whether coal lands in Alabama might be selected by the State as indemnity for the 16th section granted by the enabling act of 1819, reviews the statutes from the earliest times down to date making distinction between mineral and agricultural lands. The decision is too long to quote. It is enough to

say that Secretary Lamar proves that the two terms "agricultural" and "mineral" have been used from the first in opposition to each other, as words of technical meaning and words of classification, and that neither word has ever been used in its literal or dictionary sense.

Many other acts of Congress have used the term "agricultural lands" in contradistinction to "mineral lands." See the Act of May 5, 1876 (19 Stat. 52) which provides that in Missouri and Kansas deposits of coal, iron, lead, or other mineral are excluded from the operation of the act of May 10, 1872, "and *all lands* in said States shall be subject to disposal as *agricultural lands.*" (Italics supplied). The Act of March 3, 1883 (22 Stat. 487) provides that all public lands in Alabama whether mineral or otherwise "shall be subject to disposal only as *agricultural lands.*" (Italics supplied). The Act of May 10, 1872 (17 Stat. 91) provides that "where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party" under the homestead law. Section 13 provides that in case of contests "as to the mineral or agricultural character of land", testimony may be taken on personal notice, etc. According to the meaning attributed to "agricultural lands" by the Government, Congress assumed, in these three acts, that all of the land in Missouri, Kansas and Alabama was tillable.

Attorney General Wickersham, in 29 Op. Atty. Gen. 498, 41 L. D. 571, advised that in selecting mineral indemnity lands the company was not limited to the state in which the loss occurred. The opinion makes the distinction between "mineral" and "agricultural."

The Secretary, in *George Hathaway,* 38 L. D. 34, expressly rejects the Government's definition of agricultural lands. He said:

> "If the land is better adapted to the raising of stock, whether it be cattle, horses, or hogs, and such occupation would be more profitable than the tillage of the soil, the entryman would be justified in making such use of it to the absolute exclusion of tillage and it would fully answer the requirements of the law as to cultivation."

In *Charles C. Water,* 3 L. D. 140, Acting Commissioner Harrison makes a similar ruling which was concurred in by Attorney General Devens. In *Elnora C. Jetes,* 33 L. D. 41, Secretary Hitchcock ruled that stock grazing was equivalent to cultivation.

In *Jones v. Aztec Land and Cattle Co.,* 34 L. D. 115, Acting Secretary Ryan said:

> "No question is made in the brief and argument but that the lands in question were vacant, were surveyed, and were non-mineral, so that the only questions presented are whether they were 'public lands which are subject to homestead entry.'"

It has been repeatedly held that land chiefly valuable for timber if non-mineral may be taken under the homestead law. 9 L. D. 139; 34 L. D. 115; 29 L. D. 606; *Johnson v. Bridal Veil Lumbering Co.,* 33 Pac. 528.

In the classification of patents issued, made by the Commissioner, in his reports, the only distinction is between "agricultural lands" and "mineral lands", the number of patents of each kind being stated. See report Commissioner for 1877, p. 37; report for 1888, p. 3, in which patents

were classified as agricultural or mineral so far as the nature of the land is concerned, and other patents under various specific acts are listed, such as townsites, timber culture, etc. See also report for 1889, at pp. 10 and 11. From these reports it is obvious that agricultural patents embraced patents for all non-mineral lands, and mineral lands were separately listed under mineral patents.

From this it is certain that the words, "agricultural lands" and "mineral lands", have always been treated as technical words and words of classification. There is no instance in the records of the Land Department, in Acts of Congress, or in decisions of the courts, of the distinction between agricultural lands and tillable lands.

The Government quotes certain debates in Congress, most of which do not even relate to the Northern Pacific grant. None of these debates are of the kind that are admissible. The limitation on the use of debates is stated in *United States v. St. P. M. & M. Ry. Co.*, 247 U. S. 310, holding that such debates are not admissible, but "the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications." So far as we are advised, there is no authority for use of general debates, especially where they do not relate to the statute to be construed. However, there is certainly nothing in the debates to which the Government refers that in the least degree tends to support the Government's argument.

It is not our purpose to prolong this brief by repeating what the Master said. We do wish to call special attention, however, to his comment on the application of the

Forest Reserve Case, 256 U. S. 51. (See R. p. 462). The 5,120 acres of withdrawn lands were selected on mineral losses. According to the Government's testimony in this case, not a single acre of the Gallatin National Forest, within which those lands lay, is agricultural within its definition. In the course of the opinion it is said:

> "As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be 'selected by said company,' under the direction of the Secretary of the Interior, from unoccupied, unappropriated, *non-mineral* lands in odd-numbered sections within prescribed indemnity limits." (Italics supplied.) p. 59.

Justice Van Devanter certainly did not use the word "non-mineral" inadvertently.

It is probable that the case at bar presents the clearest and strongest case for the application of the rule of departmental and legislative construction that can be found. The cases have been cited, *supra*. See also *B. & M. R. Co. v. Hooker*, 233 U. S. 97; *Pocket Veto Case*, 279 U. S. 655; *L. & N. v. U. S.*, 282 U. S. 740.

Concluding his discussion, the Master said:

> "Thus the spirit, purpose, results, the condition of the country, the situation of our people which called for the railroad and the grants, all point to one meaning of the phrase and make absurd to my mind the literal meaning tendered by counsel through dictionary definitions" (R. 463).

It is submitted that the rulings in No. 476 from which the United States appeals should be affirmed.

Respectfully submitted,

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